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Recommendations and Reports

1992

Volume I

Administrative Conference of the United States

The Administrative Conference of the United States was established by statute as an independent agency of the federal government in 1964. Its purpose is to promote improvements in the efficiency, adequacy, and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.

To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished by direct action on the part of the affected agencies or through legislative changes.

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RECOMMENDATIONS 92-1 THROUGH 92-9

Recommendation 92-1

The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements

The Administrative Procedure Act, 5 U.S.C. §553, establishes the procedural requirements for notice-and-comment rulemaking. It requires that an agency generally publish notice and provide opportunity for public comment before adopting a rule. The section also provides for a number of specific exceptions. One of these exemptions, in subsection (b)(A), provides that the requirements for notice and comment do not apply to "rules of agency organization, procedure, or practice . . . ."[1]

The scope of APA exceptions has been described as "enshrouded in considerable smog,"[2] and the question of what is a procedural or practice rule has no clear answer.[3] The issue is in a state of flux.[4] Although courts have used a number of different tests to determine whether a rule was one of procedure or practice, none has been particularly satisfactory. Over the years the Conference has addressed the scope of most of the other exceptions to the APA rulemaking requirements.[5] Because the procedural rule exception is a subject of increasing controversy, it is appropriate for the Conference to fill this gap.

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[1] The term procedural rule will be used herein to refer to rules of agency practice and procedure. Other exemptions from notice-and-comment rulemaking requirements cover interpretive rules, policy statements, and situations where good cause exists. See section 553(b). Section 553(a) completely exempts from notice-and-comment rulemaking rules involving military or foreign affairs, agency management or personnel, grants, loans, benefits, or contracts.

[2] *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975); *see also Community Nutrition Institute v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987).

[3] There has been less debate about what are rules of agency organization.

[4] *Air Transport Association v. Department of Transportation*, 900 F.2d 369 (D.C. Cir. 1990), *cert. granted*, 111 S.Ct. 669 (1991), *judgment vacated and remanded*, 111 S. Ct. 944 (1991), *opinion vacated and petition dismissed on mootness grounds*, 933 F.2d 1043 (D.C. Cir. 1991), has recently focused attention on the scope of the exemption.

[5] Recommendation 69-8, "Elimination of Certain Exemptions from the APA Rulemaking Requirements, 1 CFR §305.69-8; Recommendation 73-5, "Elimination of the 'Military or Foreign Affairs Function' Exemption From APA Rulemaking Requirements," 1 CFR §305.73-5; Recommendation 76-5, "Interpretive Rules of General Applicability and Statements of General Policy," 1 CFR §305.76-5; Recommendation 83-2, "The 'Good Cause' Exemption from APA Rulemaking Requirements," 1 CFR §305.83-2.

The Conference has long advocated the value of notice and comment in rulemaking,[6] and this recommendation encourages agencies to use such processes voluntarily in promulgating rules of procedure or practice. Notice and comment can provide the agency with valuable input from the public as well as furnish enhanced public acceptance of the rules. On the other hand, there can be costs to the agency in using notice-and-comment procedures, including the time and effort of agency personnel, the cost of Federal Register publication, and the additional delay in implementation that results from seeking public comments and responding to them. For significant procedural rule changes, the benefits seem likely to outweigh the costs; but this may not be the case for minor procedural amendments. Thus, unless the costs outweigh the benefits, we strongly encourage agencies voluntarily to use notice and comment even where an APA exemption applies.

The Conference believes, however, that the procedural and practice rule exemption can in appropriate circumstances serve a legitimate governmental purpose, and that Congress intended it to be available in such cases. Where such rules are truly procedural, rather than substantive in a procedural mask, the statutory exemption should be available. The Conference therefore recommends, as a guide to agencies in determining when a rule is procedural, that agencies should establish first that the rule relates to an agency's internal operations[7] or methods of interacting with the public and second that the rule has no substantive impact because it neither significantly affects conduct, activity or a substantive interest that is the subject of agency regulation, nor affects the standards for eligibility for government programs.[8] Only if the proposed rule meets both parts of this test, should it be considered as being within the exemption from notice-and-comment requirements as a rule of practice or procedure. Examples of rules that would be procedural under this standard include rules governing conduct of formal hearings or appeals, ex parte rules, and rules concerning the business hours of the agency. Examples of nonexempt rules include rules relating to the criteria for determining the severity of enforcement sanctions, levels of civil money penalties, or application requirements that serve to limit eligibility for a government benefit program.

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[6] See, e.g., Recommendation 69-8, supra n.5.

[7] It is likely that some rules relating to agency internal operations will also fall within a category of rules exempt from all of section 553's requirements (including publication of a statement of basis and purpose and delayed effective date) as a "matter relating to agency management or personnel." 5 U.S.C. §553(a)(2).

[8] The term "program" is meant to be interpreted broadly to include, among others, those involving benefits, contracts, licenses, permits, and loan guarantees. In this connection, it should be noted that many agencies, following Recommendation 69-8, have voluntarily waived the exemption from notice-and-comment rulemaking for matters relating to loans, grants, benefits, or contracts.

In order to encourage agencies voluntarily to use notice and comment, the Conference also recommends that the Office of Management and Budget refrain from exercising its jurisdiction to review rules fitting within the definition of rules relating to an agency's procedure or practice when an agency voluntarily publishes them.

RECOMMENDATION

1. Federal agencies should exercise restraint in invoking the Administrative Procedure Act's statutory exceptions to the notice-and-comment rulemaking procedures. Thus, the Administrative Conference has consistently urged agencies voluntarily to use notice-and-comment procedures when issuing rules that fall within the terms of most of the exemptions under 5 U.S.C. §553.[9]

2. For rules falling within the "procedure or practice" exception in 5 U.S.C. § 553(b)(A), agencies should use notice-and-comment procedures voluntarily except in situations in which the costs of such procedures will outweigh the benefits of having public input and information on the scope and impact of the rules, and of the enhanced public acceptance of the rules that would derive from public comment.

3. In determining whether a proposed rule falls within the statutory exception for rules of agency "procedure or practice," agencies should apply the following standard: A rule is within the terms of the exception when it both (a) relates solely to agency methods of internal operations or of interacting with regulated parties or the public, and (b) does not (i) significantly affect conduct, activity, or a substantive interest that is the

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[9] In some cases, the Conference has recommended that agencies generally use notice and comment, Recommendation 76-5, "Interpretive Rules of General Applicability and Statements of General Policy," 1 CFR §305.76-5; Recommendation 83-2, "The 'Good Cause' Exemption from APA Rulemaking Requirements," 1 CFR §305.83-2. In the case of some other exemptions, the Conference has also recommended eliminating them altogether. Recommendation 69-8, "Elimination of Certain Exemptions from the APA Rulemaking Requirements, 1 CFR §305.69-8; Recommendation 73-5, "Elimination of the 'Military or Foreign Affairs Function' Exemption From APA Rulemaking Requirements," 1 CFR §305.73-5.

subject of agency jurisdiction, or (ii) affect the standards for eligibility for a government program.[10]

4. To assist agencies in implementing this recommendation, the Office of Management and Budget should refrain from exercising jurisdiction under Executive Order 12,291 with respect to rules relating to an agency's procedure or practice that an agency voluntarily publishes for notice and comment.

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[10] The term "program" is meant to be interpreted broadly to include, among others, those involving benefits, contracts, licenses, permits, and loan guarantees. See footnote 7, *supra*.

Recommendation 92-2

Agency Policy Statements

This recommendation addresses use of agency policy statements. Policy statements fall within the category of agency actions that are "rules" within the Administrative Procedure Act's definition because they constitute "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or describe law or policy," 5 U.S.C. §551(4). "Rules" include (a) legislative rules, which have been promulgated through use of legislative rulemaking procedures, usually including the notice-and-comment procedures of the Administrative Procedure Act, 5 U.S.C. §553, and (b) nonlegislative rules--that is, interpretive rules and policy statements--which fall within the above definition of "rules" but which are not required to be promulgated through use of legislative rulemaking procedures. Thus, policy statements include all substantive nonlegislative rules to the extent that they are not limited to interpreting existing law. They come with a variety of labels and include guidances, guidelines, manuals, staff instructions, opinion letters, press releases or other informal captions.

Policy statements that inform agency staff and the public regarding agency policy are beneficial to both. While they do not have the force of law (as do legislative rules) and therefore can be challenged within the agency, they nonetheless are important tools for guiding administration and enforcement of agency statutes and for advising the public of agency policy.

The Conference is concerned, however, about situations where agencies issue policy statements which they treat or which are reasonably regarded by the public as binding and dispositive of the issues they address.[1] The issuance of such binding pronouncements as policy statements does not offer the opportunity for public comment which is normally afforded during the notice-and-comment legislative rulemaking process for rules which have the force of law. Courts have frequently overruled agency reliance on policy statements as binding on affected persons.

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[1] There are many facets that must be assessed in determining whether a policy statement is operationally a rule that binds affected persons. In general, we apply the concept here to agency statements that are usually issued in permanent form and that are relied upon by an agency and its staff to apply standards whose basis, legality, and soundness cannot be challenged within the agency. Whether a statement is a matter of policy or interpretation, is issued in a permanent form, and is in fact binding (or to what extent it is binding) are often difficult questions that can only be decided in context.

Where the policy statement is treated by the agency as binding, it operates effectively as a legislative rule but without the notice-and-comment protection of §553. It may be difficult or impossible for affected persons to challenge the policy statement within the agency's own decisional process; they may be foreclosed from an opportunity to contend that the policy statement is unlawful or unwise, or that an alternative policy should be adopted. Of course, affected persons could undergo the application of the policy to them, exhaust administrative remedies and then seek judicial review of agency denials or enforcement actions, at which time they may find that the policy is given deference by the courts. The practical consequence is that this process may be costly and protracted, and that affected parties have neither the opportunity to participate in the process of policy development nor a realistic opportunity to challenge the policy when applied within the agency or on judicial review. The public is therefore denied the opportunity to comment and the agency is denied the educative value of any facts and arguments the party may have tendered.

The Conference believes this outcome should be avoided, first by requiring that when an agency contemplates an announcement of substantive policy (other than through an adjudicative decision), it should decide whether to issue the policy as a legislative rule, in a form that binds affected persons, or as a nonbinding policy statement.[2] Second, to prevent policy statements from being treated as binding as a practical matter, the recommendation suggests that agencies establish informal and flexible procedures that allow an opportunity to challenge policy statements. Recognizing that each agency's process differs, the choice of which procedures to change in implementing this recommendation remains in the discretion of each agency. Likewise, actions taken during review of the policy statement would not necessarily be affected by such reconsideration.

RECOMMENDATION

The following recommendations applicable to policy statements are intended to ensure that, before an agency promulgates substantive policies which bind[3] affected persons, it provides appropriate notice and opportunity for comment on such policies, and makes sure that policy statements are not treated as binding.

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[2] The Conference has already urged agencies to use notice-and-comment procedures, where possible, before promulgating an interpretive rule of general applicability or statement of general policy that is likely to have substantial impact on the public. Agencies were urged to use post-promulgation notice-and-comment procedure if it is not practicable to accept and consider comments before the rule is promulgated. See Recommendation 76-5, "Interpretive Rules of General Applicability and Statements of General Policy."

I. Legislative Rulemaking for Binding Policies

A. Agencies should not issue statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using legislative rulemaking procedures (normally including notice-and-comment). Specifically, agencies should not attempt to bind affected persons through policy statements.

B. When an agency publishes a legislative rule (e.g., in the Federal Register and in official agency publications), the preamble to the rule should state that it is a legislative rule intended to bind affected persons. The preamble should also cite the specific statutory authority for issuing the rule in binding form as well as the steps that it has taken to comply with procedural requirements.

II. Policy Statements

A. *Notice of Nonbinding Nature.* Policy statements of general applicability should make clear that they are not binding. Persons affected by policy statements should be advised that such policy statements may be challenged in the manner described in part B below. Agencies should also ensure, to the extent practicable, that the nonbinding nature of policy statements is communicated to all persons who apply them or advise on the basis of them, including agency staff, counsel, administrative law judges, and relevant state officials.

B. *Procedures for Challenges to Policy Statements.* Agencies that issue policy statements should examine and, where necessary, change their formal and informal procedures, where they already exist, to allow as an additional subject requests for modification or reconsideration of such statements. Agencies should also consider new procedures separate from the context in which the policy statement is actually applied. The procedures should not formal and informal procedures, where they already exist, to allow as an additional subject requests for modification or reconsideration of such statements. Agencies should also consider new procedures separate from the context in which the policy statement is actually applied. The procedures should not merely consist of an opportunity to challenge the applicability of the document or to request waivers or exemption from it; rather, affected persons should be afforded a fair opportunity to challenge the legality or wisdom of the document and to suggest alternative choices in an agency forum that assures adequate consideration by responsible agency officials. The opportunity should take place at or before the time the policy statement is applied to affected persons unless it is inappropriate or impracticable to do so. Agencies should not allow prior publication of the statement to foreclose full consideration of the positions being advanced. When a policy statement is subject to repeated challenges, agencies should consider instituting legislative rulemaking proceedings on the policy.

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[3] As the term is used here, an agency rule is "binding" when the agency treats it as a standard where noncompliance may form an independent basis for action in matters that determine the rights and obligations of any person outside the agency. This is true whether or not the rule was promulgated in accordance with §553. A document that was not issued pursuant to §553, and therefore cannot be binding *legally*, may nevertheless be binding *as a practical matter* if the agency treats it as dispositive of the issue it addresses. This recommendation is concerned only with substantive, as opposed to procedural, rules. See Recommendation 92-1, "The Procedural and Practice Rule Exemption From the APA Notice-and-Comment Rulemaking Requirements."

III. Instructions to Agency Staff

This recommendation does not preclude an agency from making a policy statement which is authoritative for staff officials in the interest of administrative uniformity or policy coherence. Indeed, agencies are encouraged to provide guidance to staff in the form of manuals and other management directives as a means to regularize employee action that directly affects the public. However, they should advise staff that while instructive to them, such policy guidance does not constitute a standard where noncompliance may form an independent basis for action in matters that determine the rights and obligations of any person outside the agency. Further, agencies are encouraged to obtain public comment on such guidance. Finally, in any case in which staff officials' adherence to such directives may affect a member of the public, care should be taken to observe the requirements of 5 U.S.C. §552(a) which imposes a publication requirement independent of any obligation to employ notice-and-comment procedures.

Recommendation 92-3

Enforcement Procedures Under the Fair Housing Act

Background

The 1968 Fair Housing Act outlaws various types of discrimination in the sale or rental of residential housing. It prohibits discrimination on the basis of race, color, religion, sex, and national origin, and covers sale and rental of residential housing, refusal to deal, and a number of related actions. In 1988, Congress amended the Fair Housing Act, by altering the enforcement provisions for violations of the antidiscrimination provisions, while at the same time extending the Act's coverage to discrimination against the handicapped and families with children.

The 1968 Act contained limited enforcement provisions, under which the Department of Housing and Urban Development (HUD) had a circumscribed role. The Act provided that persons aggrieved by discrimination could file (within 180 days) a complaint with the Secretary of HUD, who was obligated to conduct an investigation and use informal methods (conferences, conciliation and persuasion) to eliminate any discriminatory practices. If a state or local agency provided rights and remedies that were substantially equivalent to those under the federal statute,[1] the Secretary was required to refer the case to that state or local agency.

If neither agency was able to secure voluntary compliance, the aggrieved party was permitted to file a civil action in a United States District Court, unless state or local forums provided substantially equivalent rights and remedies. In such cases, the state or local court had to be used. The Act also provided for a private right of action in U.S. District Court. Remedies were limited to injunctive relief, actual damages, and punitive damages not in excess of $1,000. The 1968 Act also authorized the Department of Justice to file suit in cases involving "pattern or practice" or issues of "general public importance." Injunctive relief was available in such cases.

These remedies were considered by many to be inadequate, both because of the limited judicial remedies and the lack of an effective administrative enforcement process. In 1988, Congress amended the Act's enforcement provisions, while at the same time expanding the Act's coverage.

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[1] Among the provisions in the Act were subpoena authority and authority to submit interrogatories to respondents.

The 1988 amendments created two additional categories of people protected from discrimination under the Act. Discrimination with respect to handicapped persons is now prohibited, and is defined to include refusal to permit certain "reasonable modifications" of existing premises at the handicapped person's expense, and refusal to make certain "reasonable accommodations" for access. Discrimination against families with children is also prohibited, although there is an exception for certain "housing for older persons."

The amended enforcement provisions furnished significant new remedies. The Act now provides an administrative enforcement procedure, which requires HUD to investigate filed complaints within 100 days. The statute of limitations has been doubled to a year. During the investigation period, HUD is to undertake conciliation efforts. If those are not successful, and HUD finds "reasonable cause" to believe a violation has occurred, it must issue a formal charge of discrimination. Upon issuance of a formal charge, the complainant and respondent each have 20 days to elect to have the claim adjudicated in court. If neither party so elects, the case is heard in an APA hearing before a HUD administrative law judge, with evidence presented under the Federal Rules of Evidence. The parties to the hearing are HUD (reprensented by its Office of General Counsel) and the defendant, with the aggrieved party permitted to intervene. The ALJ has the authority to award compensatory damages and injunctive relief, and to impose civil penalties against a defendant of up to $10,000 for the first offense, $25,000 if there has been a prior violation within the previous 5 years, and $50,000 if there have been two or more violations within the previous 7 years. ALJ decisions are reviewable by the Secretary,[2] and appealable to the U.S. Courts of Appeals.

If either party elects to "remove" the case to court, the case is litigated by the Department of Justice, and the complainant may intervene. As in the administrative forum, injunctive relief and compensatory damages are available, but instead of civil money penalties, punitive damages may be awarded. A jury trial is also available.

The private right of action remains, with an extended statute of limitations, and removal of the $1000 cap on punitive damages. (Injunctive relief and compensatory damages are also available, but civil penalties are not.) There is no requirement that a party exhaust its administrative remedies before filing suit in court, but if administrative proceedings are pending, a private suit may not be filed. The Department of Justice's authority to file suit in "pattern and practice" cases remains the same, except that available relief has been expanded to include civil penalties.

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[2] HUD regulations provide that the Secretary will review only in extraordinary cases.

As under the old statute, state and local remedies are to be used to the extent that they are "substantially equivalent" to those provided for in the Act. State and local agencies must be certified by HUD as having equivalent procedures before cases must be referred to them. Agencies that had been certified prior to 1988 were grandfathered in for 40 months with respect to handling discrimination complaints covered by the prior Act. The 40-month period expired in January 1992, but was extended until September 1992. During this "grandfathering" period, state agencies could process housing discrimination complaints involving race, color, sex, religion, and national origin, even though their procedures were not substantially equivalent to the Act's amended provisions. However, until they have been specifically certified to do so, they may not handle complaints involving familial status or the handicapped.

Discussion

Implementation of the new enforcement provisions of the Act is in an early stage. HUD appears to be taking its responsibilities seriously. Some portions of the program seem to be working well, while in some others, emerging trends may be cause for concern.

The administrative hearing portion of the enforcement program appears to be functioning smoothly. To the extent that parties have elected to stay in the administrative adjudication process, their cases have been processed expeditiously. However, in more than half the cases, one of the parties has chosen to "remove" the case to court, and most of these court cases are still pending.

HUD has indicated that it is conducting a study on why so many cases are "removed" to court. The Conference applauds that endeavor, and suggests that such a study be an ongoing effort. HUD should also undertake an education program to advise potential complainants and respondents of the practical considerations that relate to the decision on which process to use. Such explanations should address the potential remedies available in each option, as well as the likely time periods that each will require for resolving the dispute.

In virtually all other civil rights enforcement processes, an existing administrative remedy must be used. In fact, in most administrative processes, parties do not have the choice between using an existing administrative process or going to court. Thus, the Fair Housing Act's provision permitting either party the choice of going through the administrative process or to court is an unusual one, offering the potential for quicker hearings in the administrative forum and larger (punitive) damages in judicial forums.

The Fair Housing Act amendments' system arose out of a political compromise resulting from, among other things, concern about the constitutionality of eliminating a party's opportunity for a jury trial in the context of fair housing rights enforcement. The existence of a right to a jury trial in this situation is a subject of some debate, but in light of this debate, as well as the recent nature of the political compromise that permitted enactment of the Fair Housing Act amendments, the Conference does not at this time recommend eliminating the option of a district court remedy. The Conference is reluctant to strongly encourage parties to use the administrative process rather than the judicial route until it has more information as to why parties select one over the other, and more data on alleged significant differences in the relief granted in each.

Under current law, complainants are not automatically parties to proceedings brought by HUD (at the administrative level) or the Department of Justice (in court) as a result of their complaints. Although procedures for intervention exist, concerns have been raised that, in some cases, the interests of complainants and the government may diverge at points in the litigation where intervention as of right is no longer available. For example, the Department of Justice may not wish to appeal a determination with which the complainant is unsatisfied. If the complainant is not already a party to the litigation, his or her appeal rights may be lost. Providing that a complainant is automatically a party to any case based on his or her complaint would alleviate this problem. Moreover, HUD should notify complainants of their right to be represented by their own counsel (separate from counsel from the government), not only at the beginning of the litigation process, but at subsequent stages where the interests of the government and of the individual complainant may diverge on a significant or dispositive issue (e.g., on the question whether to appeal an adverse decision).

The Act requires that HUD undertake conciliation efforts in cases in which complaints are filed. Conciliation efforts are made by the HUD investigator assigned to the complaint. It appears that close to 25 percent of the cases are conciliated successfully. Conciliation (and other opportunities to use alternative means of dispute resolution) should continue to be encouraged. HUD should study whether using the investigator as conciliator has been advantageous due to the investigator being knowledgeable about the case and the program, or whether parties may tend to perceive some bias because of the investigator's initial involvement in determining the objective merits of the parties' positions. Proper training in conciliation and mediation would be essential for the investigative staff if they are to continue to have a role in this part of the dispute resolution process.

A major area where HUD has not been successful in meeting its responsibility under the Act is its inability to complete investigations and determine whether or not to file charges within the 100 days allowed by statute. In fact, almost 75 percent of the Fair Housing Act complaints filed in 1990 were not processed within the 100-day statutory deadline. There are several possible reasons for this. There has been a significant increase in the number of complaints filed since the Act's amendment. Much of the burden of this increase falls on HUD, because state and local agencies have not been certified for the cases under the expanded coverage.[3] Moreover, HUD has used a fairly complicated internal review system with respect to making "cause" determinations, which might be simplified, now that its personnel have had some experience. HUD has been taking steps to ensure that complaints are processed in a timely fashion, including delegating some decisional authority to regional personnel. Such efforts are to be encouraged, so long as care is taken to ensure adequate training.

As described above, state and local agencies that provide rights and procedures substantially equivalent to those available under federal law may be certified, in which case complaints must be processed by such agencies rather than by HUD. The automatic grandfathering provisions in the 1988 Act have expired (although they have been extended to the extent permitted by the Act), and many state agencies have not been certified. There are concerns from both ends of the spectrum: concern that HUD will be overlenient in determining that the processes of state and local agencies are substantially equivalent, and concern that HUD will not act expeditiously enough in certifying those that do have equivalent processes.

As a result of the enlarged coverage of the Fair Housing Act, about one-half of the complaints over the last 2 years have involved allegations of discrimination on the basis of familial status. There also have been a substantial number of complaints involving alleged discrimination against the handicapped. Thus, the earlier concentration on discrimination cases arising under the old Act has necessarily been diluted to some degree. HUD should take care to ensure that the importance of attacking all types of discrimination within its purview continues to be recognized, notwithstanding resource limitations.

RECOMMENDATION

1. Congress should amend the Fair Housing Act to provide that each aggrieved person on whose behalf a complaint has been filed shall

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[3] It may also be that, given the financial pressures facing states, they will not take the necessary actions that would allow HUD to certify them.

automatically be deemed a party to a lawsuit or administrative proceeding that results from such complaint.

2. The Department of Housing and Urban Development (HUD) should notify each complainant of his or her option to select private counsel (separate from counsel from the government), at the time a reasonable cause finding is made, and at future points where action by government counsel is potentially adversely dispositive of that complainant's remedies. This notice should explain the potential implications to the complainant of exercising that option.

3. HUD should continue to study why parties in cases under the Fair Housing Act are opting in a large portion of cases to use the judicial process, rather than the administrative adjudication process. The results of such studies should be shared with the Administrative Conference, the Congress and the public.

4. HUD should undertake an educational program to advise potential complainants and respondents of the practical considerations that bear upon a decision to choose the administrative process or the judicial process in Fair Housing Act cases, including an explanation of the potential remedies and time periods for resolution of the dispute.

5. HUD should increase its efforts to process complaints within the 100-day statutory period. Among the alternatives it should consider are delegating increased authority to regional offices, with concomitant additional training and appropriate headquarters oversight.

6. In deciding whether to certify or maintain certifications of state and local agencies, HUD should examine closely whether such agencies offer substantially equivalent rights and procedures, and move as rapidly as possible to certify those that do.

7. HUD should encourage the use of alternative dispute resolution in all stages of Fair Housing Act cases. It should particularly monitor the conciliation process, to ensure that it is perceived as working fairly. It should continue to offer training in conciliation and mediation skills.

8. HUD should not allow efforts directed towards the newly covered categories of discrimination to diminish the recognized importance of complaints falling under the original categories.

Recommendation 92-4

Coordination of Migrant and Seasonal Farmworker Service Programs

Since the 1960s, the federal government has established numerous service programs to help meet the needs of migrant farmworkers. From the early days, migrants have been considered a uniquely federal responsibility, primarily because of their interstate movement, which makes it hard for the workers and their families to qualify for local assistance and disrupts other services like schooling for the children. As these programs have evolved, many have come to serve nonmigrant seasonal farmworkers as well.

The programs to meet health, education, housing, job training, and other needs of migrant and seasonal farmworkers (MSFWs) have developed separately. There are approximately 10 MSFW-specific service programs, and farmworkers also draw upon the assistance of numerous other general programs such as food stamps or Medicaid. The four largest federal programs are Migrant Education, administered by the Department of Education; Migrant Health and Migrant Head Start, both administered by the Department of Health and Human Services; and the Department of Labor's special job training programs for MSFWs under Section 402 of the Job Training Partnership Act.

Each program has its own definition of migrant and/or seasonal farmworker, as well as other eligibility standards. The result is a potential for overlap of some services and gaps in others, and there is no overarching provision for effective coordination among the programs. Various efforts have been undertaken at the national level to improve coordination, but with mixed success to date. These include an Interagency Committee on Migrants, a staff-level group that meets quarterly, largely for information-sharing purposes; an Interagency Coordinating Council, established informally as a forum for policy-level decisionmakers involved in the various programs, but now inactive; and a Migrant Inter-Association Coordinating Committee, involving nonprofit grantees and other organizations representing direct service providers.

In addition, MSFWs often qualify for other services provided by state and local governments or funded through private initiative, each governed by its own particular definitions or eligibility standards. These services are especially important in areas where some or all of the major federal programs are not present. Effective local service providers therefore have to be adroit in locating those available services, from whatever source, that can best meet the needs of their clientele. Because of the great variety in locally available services of this kind, much of the task of coordination among MSFW service programs necessarily takes place at the local and state level. Many states are finding ways to encourage this process by the creation of a governor's committee or task force, involving service providers, growers, representative government officials, farmworkers, and others.

The federal government should also take steps to improve coordination of services. For example, the intake procedures for each service program (now typically undertaken separately by each of the agencies, despite considerable duplication) should be streamlined. To effectuate such efforts, and to provide better interagency consultations before program changes are introduced, the President should establish by executive order a policy-level Interagency Coordinating Council on MSFW programs. This Council is not intended to replace, and indeed should promote, existing coordination at the program staff, state, and service delivery level.

To facilitate interagency coordination, whether or not such a Council is created, a reliable system for gathering data on the nation's population of MSFWs is needed. Although each agency has its own mechanism for generating program statistics and estimates of the target population, these vary widely in method and scope, and each suffers from specific inadequacies. They produce widely varying pictures of the nation's population of MSFWs, to the continuing frustration of legislators, service providers, researchers, and others. Agricultural labor data have always been left out of the Department of Labor's regular employment data system, and no other adequate permanent data source now fills the gap. The recommendation provides some guidance on the goals of such an information-gathering effort.

RECOMMENDATION

I. Coordination at the national level

An Interagency Coordinating Council on migrant and seasonal farmworker (MSFW) programs should be established to strengthen national coordination of MSFW service programs. The Council would be charged, inter alia, with identifying specific coordination tasks to be accomplished, in most cases under the primary responsibility of a designated lead agency.

A. To ensure an enduring structure and a clear mandate, the President should issue an executive order creating the Council, specifying the policy-level officials from appropriate agencies who would be permanent members and designating a chair. The order should also designate an agency that would initially have primary responsibility for staffing the Council's meetings and other functions. The Council should be specifically charged to coordinate and review MSFW service programs, giving particular attention to gaps in services and unjustified overlap. It should encourage public participation through public meetings, creation of an advisory committee, or other means.

B. The executive order should provide that the Council, in cooperation with the Office of Management and Budget, review proposals for significant changes in any agency's MSFW service program (including proposed legislation, regulations, and grantee performance standards). OMB should consolidate or coordinate its own oversight of all federal MSFW service programs.

C. The executive order should assign to the Council the initial responsibility to develop, through delegations to the appropriate agencies, a reliable and comprehensive MSFW population census system, independent of any of the specific programs, along the lines described in part II. Other specific coordination tasks that the Council might wish to take up include development of consolidated or streamlined intake processing for MSFW programs, provision of better linkages among existing MSFW information clearinghouses, and encouragement of cooperation among direct service providers.

D. The Council should identify and assign priorities to the coordination tasks to be accomplished, with a strategy and timetable for their achievement. In most instances, it should assign lead responsibility for each specific coordination task to a designated agency. That agency's coordination efforts with other agencies may include suggesting regulations or other implementation measures.

E. The Council should study the differing eligibility standards of MSFW programs and identify, if appropriate, where consistency could be achieved without substantial impact on the beneficiaries of those programs.

F. The Council should also study and make recommendations on the strengthening of state and local coordination of MSFW programs.

II. Information gathering on migrant and seasonal farmworkers

A. To improve coordination of and service delivery in MSFW programs, the executive order should:

(1) Authorize the Council to develop an integrated, cost-effective system for gathering data on the number, characteristics, and distribution of MSFWs and their dependents;

(2) Authorize the Council to designate an appropriate agency to have responsibility for collecting the data, with the cooperation of federal agencies with MSFW service programs;

(3) Direct appropriate federal agencies with expertise in gathering these kinds of data, such as the Bureau of the Census, the Bureau of Labor Statistics, the National Center for Education Statistics, or the National Agricultural Statistics Service, to cooperate with the Council's effort; and

(4) Provide opportunities for submission of data and information from the public.

B. This data system should ensure that the information gathered on MSFWs and their dependents sufficiently describes workers employed in a broad spectrum of U.S. agriculture and related industry. This means that the data should include and distinguish among workers employed, for example, in crop and livestock production, the packing and processing of farm products, and fisheries. Data should be collected on workers and their dependents, including such factors as recency and frequency of migration, farm and nonfarm earnings and periods of employment, and health, education, and housing characteristics. These comprehensive data should be collected in a form designed to be useful to service programs with differing definitions of eligible workers and their dependents.

C. This data system should be designed to help the Council identify general trends--including changes in the total number of MSFWs and their dependents and employment patterns--and opportunities for coordination among MSFW programs. To help achieve this goal, the Council should consider whether there are areas in which a consensus on a set of common characteristics of MSFWs should be developed for statistical purposes.

Recommendation 92-5

Streamlining Attorney's Fee Litigation Under the Equal Access to Justice Act

Congress first waived the government's immunity from attorney's fee awards in the Equal Access to Justice Act (EAJA), 5 U.S.C. §504, 28 U.S.C. §2412(d), in 1980 and reenacted the Act in 1985. The EAJA authorizes certain private parties that prevail in nontort civil litigation against the United States in both courts and agencies to recover their fees and expenses. No recovery is allowed, however, if the government demonstrates that its position was substantially justified, which has been construed to require the government to show that its position had a reasonable basis in both law and fact. The Act precludes fee awards to parties that exceed a specified net worth or, in the case of businesses and organizations, number of employees. It also sets a maximum hourly rate for attorney's fees of $75 per hour. The rate can be raised if the court "determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee"; in agency proceedings, the agency must make such a determination through rulemaking. With cost-of-living increases, attorneys can, at present, hope to recover a little over $100 per hour under the EAJA for most court litigation, though they remain limited to $75 per hour for most litigation before agencies.

Congress sought to accomplish two interconnected goals in the Act: to provide an incentive for private parties to contest government overreaching and to deter government wrongdoing. Congress feared that parties with limited resources would not be able to defend vigorously against government enforcement actions or to challenge opprobrious regulation. One-way fee shifting under the Act was intended to help rectify the imbalance in resources. Because fee awards must be paid out of the offending agency's budget, Congress hoped that EAJA litigation would also spur agencies to act more prudently, particularly when determining the rights of parties of modest means.

Congress originally estimated that the EAJA would cost the government $100 million a year. In recent years, approximately 2,000 EAJA applications have been resolved each year, of which the vast majority involve social security disability or similar individual benefits disputes. The total payout of fees in these cases has been only $5 to $7 million per year.

Reducing Litigation and Encouraging Settlement

Although the EAJA may not have been used as often as predicted, it has nevertheless generated a significant amount of contentious litigation. Relatively few EAJA applications appear to be settled, and the empirical evidence available indicates that fee litigation often results in more complicated proceedings than are merited. Ambiguous provisions in the Act--such as the substantial justification standard and the provision permitting enhancements to the fee cap--foster additional litigation and minimize the potential for settlement of fee disputes. The Administrative Conference believes that amendments to the EAJA would produce significant savings in litigation costs.

To reduce litigation over the proper amount of fees awardable under the EAJA, the Conference recommends several technical modifications to the Act. First, Congress should strike the provision allowing enhancement of fees when "a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." The enhancement provision breeds uncertainty, costs money to litigate, and makes settlement more difficult to obtain. Second, Congress should amend 28 U.S.C. §2412(d)(2) to specify how courts should calculate cost-of-living increases. Little is gained by litigating over issues such as which price index or subcategory of an index to use in these calculations. Third, Congress should make clear that fees are to be calculated at the adjusted rate applicable on the date the judge or adjudicator issues an order granting the EAJA application. Currently, courts are split as to when the cost-of-living increase is applicable--for instance, whether it should be calculated as of the date the work is performed, or as of some later date. Choosing the date when the application is granted creates a bright-line rule that should simplify the calculation and compensate a private party to a limited extent for the delay in payment, *e.g.*, payment in 1992 for work performed in 1986. Fourth, because the Conference recommends eliminating the enhancement provision and including an offer-of-judgment provision (described below), both of which should tend to reduce the fees payable by the government, it also recommends raising the fee cap to approximate more closely the prevailing market rate for attorneys, to ensure that the level of compensation under the Act remains adequate to serve its purposes.

In addition to these relatively technical modifications to the Act, the Administrative Conference recommends that Congress enact an offer-of-judgment provision to help encourage settlements of fee disputes arising under the EAJA. Upon receiving a private party's fee application, the government could make an offer of judgment as to the fee award. If the private party rejects that offer and ultimately recovers no more than the offer, it could not recover any fees or expenses incurred for services rendered after the offer was rejected. The offer-of-judgment device should encourage settlement, thereby saving both parties the expense of litigating fee disputes; while the government party gains leverage by extending an offer of judgment, the private party benefits from the opportunity to obtain prompt payment of fees.

This offer of judgment recommendation and the four technical recommendations that precede it involve careful balancing of factors that may either increase or reduce the incentives for attorneys to accept EAJA cases. The Conference presents them as a single package, rather than separate proposals, and emphasizes the interrelationship among the recommendations.

The Conference also recommends that Congress act to resolve problems involving implementation of the EAJA's requirement that parties seeking fees file applications within 30 days after final judgment (or final disposition in agency proceedings). Thirty days does not always provide adequate time for prevailing parties to prepare the necessary materials, and the jurisdictional nature of the requirement forecloses the option of a time extension. Extending the filing deadline to 60 days would reduce the pressure on fee applicants without undue prejudice to the government. More importantly, the Supreme Court's recent decisions in *Melkonyan v. Sullivan*, 111 S. Ct. 2157 (1991), and *Sullivan v. Finkelstein*, 110 S. Ct. 2658 (1990), have spawned significant litigation about the timeliness of EAJA applications when the federal courts remand cases to agencies. Currently, some district court remands to agencies are considered final judgments, thus triggering the 30-day filing limit in the EAJA, even though claimants do not yet know whether they have "prevailed" in the underlying action. The uncertainty created by these cases could be avoided by making clear in the statute that the filing deadline is not triggered in a proceeding on remand until the party has prevailed in the remanded proceeding. Alternatively, Congress could resolve these problems by deleting the 30-day requirement. Most other attorney's fee statutes do not include any such deadline, and attorneys waiting to be paid for their services will have no incentive to delay filing.

Congress should also encourage private parties litigating against the United States to inform the court or administrative adjudicator before judgment if they intend to apply for EAJA fees should they prevail. This would permit such decisionmakers, in appropriate cases, to make a determination as to the substantial justification of the government's position at the same time they resolve the merits. That simultaneous finding may obviate the need for more extensive briefs at a later time.

Streamlining Fee Disputes in Individual Benefit Cases

Individual benefit claims brought directly under 42 U.S.C. §405(g) or under a provision cross-referencing 42 U.S.C. §405(g), which include social security disability, SSI, Medicare and similar claims, raise some unique issues deserving special consideration. Currently, the substantial justification issue is litigated in a high percentage of all EAJA disputes arising out of such benefit cases; from July 1989 to June 1990, the government prevailed in less than 15% of these disputes. The average EAJA award in such cases is less than $3,500. In light of these facts, the Conference concludes that the substantial justification standard should be eliminated for benefit cases involving individual claimants (but not for class actions). Although automatic fee shifting in these cases would increase the government's exposure to EAJA awards, that increase would be counterbalanced to some extent by the elimination of considerable governmental expense in litigating the substantial justification issue.

More importantly, elimination of the substantial justification standard should enable benefit claimants to find representation. Currently, parties seeking to press small disability claims and most SSI claims may have difficulty retaining counsel either through hourly rates or through a contingency fee arrangement; eliminating the substantial justification standard should help ensure the availability of counsel in these cases by making certain that a reasonable fee will be available for any successful claim. In addition, in cases--primarily disability cases--in which claimants can obtain counsel through contingency fee arrangements (restricted, in social security cases, to a reasonable fee not to exceed 25% of back benefits, 42 U.S.C. §406(b)), their counsel currently have little incentive to apply for fees under the EAJA. If counsel have a contingency fee arrangement and obtain an EAJA fee award, they must return the lesser award to the claimant. Pub. L. No. 96-481, §206, as amended by Pub.L. No. 99-80, §3, 99 Stat. 186 (August 5, 1985). Not surprisingly, many successful benefits claimants do not apply for EAJA fees (fewer than 40 percent did so from July 1989 to June 1990), even though private parties' success rate in EAJA litigation exceeds 80 percent.

Extending the EAJA's Coverage

Finally, the Conference recommends that Congress consider extending the Act's coverage, on a category-by-category basis, to particular agency and court proceedings that have the same characteristics as those adversary proceedings now covered by the Act. The Act covers only "adversarial adjudications" in agencies, which are defined as "adjudications under section 554 of [title 5]." The Supreme Court in *Ardestani v. INS*, 112 S. Ct. 515 (1991), construed that provision to exclude agency proceedings--such as deportation cases--which have virtually the identical attributes as proceedings under §554 but are not technically covered by that provision. Similarly, it is unclear whether the

EAJA covers all litigation against the United States in Article I courts, even though such proceedings are often directly analogous to those covered by the Act in Article III courts. Congress has dealt explicitly with some of these courts; for example, the EAJA was amended in 1985 to include the United States Claims Court, and a separate statute, with somewhat different standards than the EAJA, provides for fee awards in Tax Court proceedings. 26 U.S.C. §7431. But other Article I bodies remain to be considered. The Court of Veterans Appeals, for example, recently decided that it does not have authority to award attorney's fees under the Act. *Jones v. Derwinski*, No. 90-58 (March 13, 1992).

RECOMMENDATION

1. Congress should amend the Equal Access to Justice Act, 5 U.S.C. §504, 28 U.S.C. §2412(d), as follows:

A. To reduce litigation over the dollar value of fee awards, (1) the provision in the Act allowing enhancement of fees when "a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee" should be stricken, (2) the Act should specify the precise method to be used in calculating future cost-of-living adjustments to the fee cap, (3) the Act should state that the rate to be used is the one that is applicable when the judge's (or administrative adjudicator's) order awarding EAJA fees is issued, and (4) the $75 per hour fee cap should be raised to approximate more closely the prevailing market rate for attorneys.

B. To encourage settlements, the Act should include an offer-of-judgment procedure: after an EAJA application is filed, the government may make an offer of judgment on the EAJA claim; if the private party rejects the government's offer and is ultimately awarded no more than that offer, that party forfeits the right to seek fees or expenses for the EAJA litigation from the time the offer of judgment is rejected.

C. To eliminate litigation on the question of when prevailing parties must file for fees, either the 30-day filing deadline in 5 U.S.C. §504 and 28 U.S.C. §2412(d) should be extended to 60 days, to run from the date of final disposition of the case,[1] or the filing deadline should be eliminated.

D. To promote judicial economy, the Act should encourage private parties litigating against the United States to notify the court or administrative adjudicator prior to judgment if they intend to file an EAJA application should they prevail, so as to enable the decisionmaker, in appropriate cases, to determine whether the government's position was substantially justified within the meaning of the Act at the same time that judgment is entered against the United States.

2. Congress should modify the provisions of 28 U.S.C. §2412(d) as they apply to individual benefit claims either brought directly under 42 U.S.C. §405(g) or under a provision cross-referencing 42 U.S.C. §405(g) in the federal courts. For those cases, the Act should provide for fee awards to prevailing claimants in individual actions without reference to whether the position of the United States was substantially justified.

3. Congress should consider whether to extend the Act's coverage, on a category-by-category basis, to:

A. Agency proceedings that, although not technically adjudications "under section 554 [of Title 5]," are required by statute to employ procedures equivalent to those of such formal adversary proceedings.

B. Proceedings before Article I courts that have the same attributes as covered proceedings in Article III courts and in agencies.

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[1] "Final disposition" occurs when a party has prevailed in a proceeding and the disposition of the proceeding is final and unappealable; in proceedings involving a remand from a court to an agency, final disposition does not occur until the remanded proceeding is concluded and the resulting administrative order is final and unappealable.

Recommendation 92-6

Implementation of the Noise Control Act

In 1981, Congress agreed to the Administration's proposal to cease funding for the Office of Noise Abatement and Control (ONAC) in the Environmental Protection Agency (EPA). Congress, however, did not repeal the Noise Control Act[1] when it eliminated ONAC's funding.

Before the elimination of ONAC, EPA engaged in a wide variety of activities to abate noise pollution under authority of the Noise Control Act and, after 1978, the Quiet Communities Act.[2] These included identifying sources of noise for regulation, promulgating noise emission standards, coordinating federal noise research and noise abatement, working with industry and international, state and local regulators to develop consensus standards, disseminating information and educational materials, and sponsoring research concerning the effects of noise and the methods by which it can be abated. The Quiet Communities Act authorized EPA to provide grants to state and local governments for noise abatement.

EPA ceased virtually all noise abatement activities after ONAC's funding was eliminated. However, the federal noise emission and labeling standards it had promulgated have remained in effect, thereby preempting state and local governments from adopting different standards. Thus, the standards remain frozen, as neither the EPA nor the state or local agencies have been in a position to amend or update possibly outmoded standards despite the technological developments of the last decade. Moreover, some private rights to bring tort or other actions may be affected by these EPA emission and labeling standards.

The Conference recognizes that the decision to end funding was substantive rather than procedural, but, in part, the impact has been procedural.[3] No procedure has been available for a decade to reexamine the existing preemptive standards to take into account developments in science and technology that may bear on implementation of the legislative intent. Elimination of funding for the agency's noise control program has had the additional procedural effect of leaving several proposed but unissued standards pending for a decade without final action by EPA.

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[1] 42 U.S.C. §§4901-4918 (1988).

[2] 42 U.S.C. §4913 (1988).

[3] Although Congress eliminated funding for the Noise Control Act after ONAC had adopted some preemptive regulations and proposed others, it did not repeal the Noise Control Act. This situation is different from the more common circumstance where Congress passes legislation but does not fund its implementation.

EPA retains the statutory responsibility for enforcing the Noise Control Act, and has used minimal resources for engaging in limited enforcement and other related activities.[4] Pursuant to this authority, EPA has asked the Conference to assist it in reevaluating the current status of the Noise Control Act by recommending options that relate to procedural considerations. The Conference takes no position concerning what actions, if any, EPA should take regarding enforcement and implementation of the Noise Control Act. If EPA wishes to assess the current situation, however, the Conference has identified considerations that should be part of such reassessment.

The Conference is unaware of any other instance where Congress has eliminated the funding for an ongoing program that preempts state and local actions without also ending the statutory authorization for that program or addressing the preemptive effect of existing regulations. If this situation does exist in other contexts, there may be procedural problems similar to those associated with the Noise Control Act.

RECOMMENDATION

1. In considering its authority and responsibility under the Noise Control Act, the Environmental Protection Agency (EPA) should analyze the preemptive impact of its existing and pending noise standards for the purpose of eliminating, where possible, any unintended impacts. EPA should then advise the appropriate congressional committees respecting the preemptive effects of EPA's possibly outmoded regulations under the Noise Control Act,[5] or any other implications of the cessation of funding respecting the agency's responsibilities under the Act.

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[4] Since 1981, EPA has engaged only in very limited enforcement of existing noise regulations, disseminating information created during ONAC's existence, and commenting on environmental impact statements issued by the Federal Aviation Administration concerning airport noise. The FAA has independent authority to abate airport noise under the Noise Control Act and the Aviation Noise and Capacity Act, Pub. L. No. 101-508, §§9301-09 (1990). Responsibility for the enforcement of EPA's railroad and motor carrier emission standards is located in the Department of Transportation, which has funding for this purpose. The Department, however, does not have authority to promulgate new or amended emission standards different from those adopted by EPA.

[5] See Conference Recommendation 84-5, "Preemption of State Regulation by Federal Agencies," 1 CFR §305.84-5.

2. In making the determinations called for under this recommendation, EPA should take into account, among other considerations:

(a) The scientific and technological developments that have occurred since 1981;

(b) Whether there is a need to update EPA's past methodology for measuring and assessing the effects of noise;

(c) The appropriate allocation of responsibility among federal agencies, and between the federal government and the states and localities, in accomplishing any goals determined by Congress respecting regulation of noise, educating the public on the dangers posed by noise, and sponsoring research into noise effects and abatement techniques;

(d) Whether there is a need for additional coordination of the noise abatement activities of federal agencies and the states and localities;

(e) The adequacy of current coordination between the United States and foreign government agencies concerning noise abatement standards and regulations impacting U.S. international trade;[6]

(f) Any appropriate federal government participation in the activities of private-sector standard-setting organizations concerning noise;[7] and

(g) The relative advantages and disadvantages of utilizing public education, market incentives, emission standards, or other approaches for any abatement of noise that Congress may wish to pursue.

3. After reviewing whatever advice may be received from EPA under this recommendation, the appropriate congressional committees should review the issues raised by the foregoing recommendations, including whether the continuation of substantive regulatory requirements without funding, or EPA's inability to reexamine, modify, or rescind those requirements, creates undue procedural burdens upon industry, the states, and the public. Congress should then either repeal the Noise Control Act or fund whatever responsibilities under the Act Congress delegates to EPA.

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[6] See Conference Recommendation 91-1, "Federal Agency Cooperation with Foreign Government Regulators," 1 CFR §305.91-1.

[7] See Conference Recommendation 78-4, "Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation," 1 CFR §305.78-4.

Recommendation 92-7

The Federal Administrative Judiciary

Preamble

At the request of the Office of Personnel Management, the Administrative Conference undertook a study of a series of issues relating to the roles of federal administrative law judges (ALJs) and non-ALJ adjudicators, or administrative judges (AJs),[1] as they have evolved over the last several decades. The study addressed a number of different issues, including those relating to selection and evaluation of ALJs and AJs, the relationship of ALJs and AJs to their employing agencies, including the appropriate level of "independence" of such decisionmakers, and under what circumstances each type of decisionmaker should be used. Many of these issues are controversial, and the Conference has heard strong arguments from those with differing views.

The Administrative Conference takes as its starting point in considering the role of the federal administrative judiciary the role created for "hearing examiners," now redesignated as "administrative law judges," in the Administrative Procedure Act in 1946.[2] That Act contemplated the existence of impartial factfinders, with substantive expertise in the subjects relevant to the adjudications over which they preside, who would be insulated from the investigatory and prosecutorial efforts of employing agencies through protections concerning hiring, salary, and tenure, as well as separation-of-functions requirements. The decisions of such impartial factfinders were made subject to broad review by agency heads to ensure that the accountable appointee at the top of each agency has control over the policymaking for which the agency has responsibility.

The need for impartial factfinders in administrative adjudications is evident. To ensure the acceptability of the process, some degree of adjudicator independence is necessary in those adjudications involving some kind of hearing.[3] The legitimacy of an adjudicatory process also depends on the consistency of its results and its efficiency.

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[1] The term "administrative judge," as used here, includes non-ALJ hearing officers, whatever their title, who preside at adjudicatory hearings.

[2] In 1969, the Conference addressed some of these issues in the context of hearing examiners. See Conference Recommendation 69-9, 1 CFR §305.69-9 (Part A) (1988). Many of the recommendations set forth here pertaining to selection and training of ALJs are broadly consistent with the earlier recommendation, but to the extent that they differ, this recommendation is intended to supersede Part A of Recommendation 69-9.

ALJs possess a degree of independence that dates back to the enactment of the APA and is governed by the APA and related statutes. The APA provides that certain separations of functions must be observed to protect the ALJ from improper pressures from agency investigators and prosecutors. ALJs are selected through a special process overseen by OPM. Their pay is set by statute and OPM regulations. Any attempt by an agency to discipline or remove an ALJ requires a formal hearing at the Merit Systems Protection Board. ALJs are also exempt from the performance appraisal requirements applicable to almost all other federal employees under the Civil Service Reform Act.

While the number of ALJs in the federal government has leveled off in the last decade, and has actually decreased outside of the Social Security Administration, some agencies have been making increased use of AJs. The amount of functional independence accorded to AJs varies with the particular agency and type of adjudication; however, AJs generally lack the statutory protections guaranteed to ALJs. AJs are not statutorily exempt from performance appraisals, and several major groups of AJs regularly undergo such appraisals by the agencies for which they work. In general, however, AJs presiding in agency adjudications in which a hearing is provided are accorded de facto protection from pressure from agency investigators and prosecutors, and, according to the Conference's survey, do not perceive themselves as significantly more subject to agency pressure than do ALJs.

The Conference's general view is that the movement away from the uniformity of qualifications, procedures, and protections of independence that derives from using ALJs in appropriate adjudications is unfortunate. The Conference believes that, to some extent, this movement away from ALJs toward AJs has been fueled by perceptions among agency management of difficulties in selecting and managing ALJs. These recommendations attempt to address these perceived problems. It should be noted that these recommendations are interdependent. For example, recommendations concerning the conversion of AJ positions to ALJ positions, and creation of new ALJ positions in new programs, are premised on the implementation of improvements in the selection and evaluation processes.

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[3] The study underlying this recommendation limited its consideration to adjudicators who preside over some kind of hearing. More informal adjudication processes are outside the scope of the study.

Use of ALJs and AJs

There is no apparent rationale undergirding current congressional or agency decisions on the use of ALJs or non-ALJs in particular types of cases. Congress seems to make such choices on an ad hoc basis. Moreover, it is quite clear that similar types of determinations made in different agencies are being made by different types of decisionmakers. For example, disability benefits adjudications at the Social Security Administration are handled by ALJs; at the Department of Veterans Affairs, AJs adjudicate similar types of cases. Moreover, in some contexts, non-ALJ adjudicators preside over cases in which extremely important issues of personal liberty are potentially at stake, such as deportation proceedings and security clearance cases.

The uniform structure established by the APA for on-the-record hearings and for qualifications of presiding officers serves to provide a consistency that helps furnish legitimacy and acceptance of agency adjudication. A rationalized system of determining when ALJs should be used would encourage uniformity not only in procedure, and in the qualifications of the initial decider, but in adjudication of similar interests. The Conference, therefore, recommends that Congress consider the conversion of AJ positions to ALJ positions in certain contexts. While the Conference does not identify specific types of cases for which such conversion should be made, it proposes a series of factors for Congress to consider in making such determinations; these same factors should also apply when Congress creates new programs involving evidentiary hearings.

One critical factor is the nature of the interest being adjudicated. The separation of functions mandated by the APA, as well as the selection criteria designed to ensure the highest quality adjudicators, are of particular value in situations where the most important interests are at stake. Generally speaking, a hearing that is likely to involve a substantial impact on personal liberties or freedom, for example, is one where use of an ALJ likely would be appropriate. Similarly, cases that could result in an order carrying with it a criminal-like finding of culpability, imposition of sanctions with a substantial economic effect (such as large monetary penalties or some license revocations),[4] or a determination of discrimination under civil rights laws (unless there is an opportunity for a de novo hearing in court) represent categories of proceedings that may call for ALJ use. This characterization should be done for types of cases rather than for particular cases.

Another factor to consider is whether the procedures established by statute or by rule for cases heard and decided are, or would be, substantially equivalent to APA formal hearings. In such cases, the additional uniformity that would derive from making the cases formally subject to 5 U.S.C. §§554, 556, and 557 would argue in favor of ALJs.

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[4] Grant or contract disputes would not fall within this category, unless a monetary penalty was involved.

ALJs are required to be lawyers. Some AJs who decide cases are not lawyers, but have other needed specialized expertise. For example, certain adjudicators at the Nuclear Regulatory Commission are physicists or engineers who participate on multi-member boards. In determining whether it is appropriate to use ALJs in particular types of cases, Congress should consider whether the benefits of using ALJs are outweighed by the benefits of having other expertise brought to bear. It should also consider whether lawyers serving with nonlawyers on decision panels should be ALJs.

A final consideration, particularly in the context of considering conversion of existing AJ positions to ALJ positions, is the extent to which the current adjudicators closely approximate ALJs in their decisional independence, the criteria for their selection, or their compensation and experience levels. If existing AJs are functioning well and do not approach parity with ALJs on these criteria, there may be no need to make the conversion. On the other hand, if they closely match ALJs on these factors, uniformity interests may weigh in favor of conversion.

Although none of these factors is necessarily intended to be determinative, the more that these factors weigh in favor of ALJ status for the decisionmaker, the more appropriate it is for Congress to mandate such status. It should be noted, however, that these recommendations are not intended to be seen as encouraging increased formalization of administrative adjudicatory processes.

In situations where Congress does convert AJ positions to ALJ positions, those AJs who can satisfy OPM eligibility qualifications should be eligible for immediate appointment as ALJs. Thus, only those existing AJs meeting the standards for ALJ appointment would become ALJs, but they would not be required to go through the competitive selection process.

Historically, OPM has had responsibility to review and rule on agency requests for additional ALJ positions. In the past, when there were government-wide limits on "supergrade" positions, which included ALJs, this oversight role served a purpose. Those limits no longer exist, and it is no longer necessary for OPM to participate in this process. Agencies should be free, within their normal resource allocation constraints, to determine for themselves whether they need more or fewer ALJs.

ALJ Selection

The selection process for ALJs has been administered by OPM (and its predecessor agency) since 1946. OPM develops the criteria for selection, accepts applications for the register of eligibles, and rates the applicants on the basis of their experience as described in a lengthy statement prepared by the applicant, a personal reference inquiry, a written demonstration of decision-writing ability, and a panel interview. The scores from this process determine an applicant's rank on the register of eligibles. Because OPM has historically considered ALJs as being in the competitive service, OPM follows the statutory requirements for filling vacancies. Thus, OPM rates and ranks eligibles on a scale from 70 to 100, and when an agency seeks to fill a vacancy, OPM certifies the top three names on the register to that agency. In practice, only applicants with scores from 85 to 100 have been certified.

The Veterans' Preference Act, which has historically applied to most civil service hiring, is applicable to selection of administrative law judges. As applied, veterans deemed qualified for the preference are awarded an extra 5 points, and disabled veterans are awarded an extra 10 points in their scores. These extra points have had an extremely large impact, given the small range in unadjusted scores. In addition, under current law, agencies may not pass over a veteran to hire a nonveteran with the same or lower score on the certificate. As a consequence, application of the veterans' preference has almost always been determinative in the ALJ selection system.

There has been concern about the ALJ selection process, arising from the determinative impact of veterans' preference and the very limited selection options available to agencies. In fact, most agencies in recent years have found ways to circumvent this process somewhat, primarily by hiring laterally from other agency ALJ offices, or (in those few agencies that hire substantial numbers of ALJs) by waiting until there are numerous slots to fill at one time, thus entitling them to a larger certificate of eligibles from OPM.

Despite this circumvention, the application of veterans' preference to the ALJ selection process has had a materially negative effect on the potential quality of the federal administrative judiciary primarily because it has effectively prevented agencies from being able to hire representative numbers of qualified women candidates as ALJs. There is also some evidence that application of the veterans' preference may have adversely affected the hiring of racial minorities. Thus, agencies are prevented from being able to select the best qualified ALJs for specific positions from a pool of representative applicants. The Conference recognizes that the general policy of veterans' preference in federal hiring reflects a valid social concern, particularly as it helps those who leave military service enter the federal civilian workforce. But, in view of the conflict between this policy and the valid need of federal agencies to have an opportunity to select the best qualified ALJs from among representative applicants, the Conference recommends that Congress abolish veterans' preference in the particular and limited context of ALJ selection.[5] In that connection, it should be noted that in 1978, Congress created a similar narrow exemption for members of the Senior Executive Service. Moreover, there is no veterans' preference in the selection for any other federal judicial position.

The Conference's recommendation on the selection of ALJs would leave with OPM the responsibility for preparing the register of eligibles (i.e., for determining the basic qualifications for the position and rating the applicants). OPM is urged to ensure that all applicants placed on the register are in fact qualified to fulfill the responsibilities of being an ALJ.

In conjunction with this, however, the recommendation would also expand the choices that agencies would have in selecting from among those qualified applicants. Under this recommendation, after OPM rated the applicants, it would compile a register of all applicants deemed qualified following the final rating process. An agency could request a certificate with the names of all applicants whose numerical ratings placed them in the highest-ranked 50 percent of the register. Agencies could also request a certificate containing a smaller number of names or applicants in a higher percentile. The agency would have the authority to hire anyone on the certificate.[6]

In addition, if, following review of the highest-ranked 50 percent, an agency needed to review additional names to find a suitable candidate, it could request an additional certificate from OPM. Such an exception should be invoked rarely, and only upon a showing of exceptional circumstances.

The Conference recognizes that any limitation on the number of qualified candidates on the certificate, including the "top three" limitation now in place, might be criticized as arbitrary. By recommending the highest-ranked 50 percent of the applicants OPM has determined to be qualified, the Conference is attempting to balance two factors. The Conference recognizes the agencies' strong interest in having a substantially larger pool of qualified candidates from which to select ALJs who meet their varying criteria and needs. It also recognizes the importance of ensuring that such a pool is highly qualified, as measured by a uniform objective rating system. The Conference believes that its recommendation provides a reasonable balance of these factors. It provides a pool large enough that agencies should be able to find candidates for ALJ positions who satisfy their varying and specific needs. At the same time, OPM estimates that the top 50 percent of the register corresponds to those applicants with scores of 85 or better out of 100.

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[5] The Conference has recommended a similar modification to the veterans' preference in this context before. See Conference Recommendation 69-9, 1 CFR §305.69-9 ¶A(4) (1988).

[6] In order to implement this recommendation, Congress would need at a minimum to modify the veterans' preference to eliminate the provision restricting the passing over of veterans, so that agencies would have the ability to hire any qualified applicant on the certificate.

Agencies would also have access to a computerized database that would contain the complete application files of individual applicants on their certificate, including numerical ratings, geographical or agency preferences, particular kinds of experience, and veterans status. This database would allow agencies the option to narrow the list of qualified applicants and focus on those whom they would like to consider further. For example, an agency could search for all candidates willing to relocate to New York City, who spoke Spanish, and had ratings in the top 20 percent.

To ensure that the register contains a broad range of qualified applicants, the Conference also recommends that OPM and hiring agencies expand recruitment of women and minority applicants for ALJ positions. In addition, because questions have been raised about OPM's current method of assessing litigation experience for the purposes of scoring applicants for ALJ positions, the Conference recommends that OPM review its rating criteria to determine whether they are appropriate.

For much of the last decade, the register has been closed, thus precluding newly interested applicants from being considered for ALJ positions. Although OPM deferred reopening the register pending the outcome of the Conference's consideration and recommendations, it has announced that the register will be reopened in the spring of 1993. While the Conference's recommendations would significantly affect the ALJ selection process, the impact would come mostly at the end of the process, after OPM has evaluated and rated the new applicants. This procedure is likely to be a time-consuming one, given the expected large influx of applicants. Therefore, the Conference supports reopening the application process, so that OPM can begin rating the candidates now, even though the recommended changes in the later stages have not yet been implemented. This way, when and if those changes are in place, the updated register will be readily available. It should be noted, however, that the Conference is also recommending that OPM review some of its rating criteria, which would need to be done before it begins rating new applicants.

OPM has indicated that it has a planned program to expand recruitment of women and minority applicants for the register. The Conference both encourages OPM to give such a program a high priority, and recommends that OPM and the hiring agencies take steps in particular to recruit among minority bar associations and other institutions with large numbers of minorities or women.

The Conference's view is that implementing these recommendations will provide agencies the opportunity to select ALJs from a broad range of highly qualified candidates and to hire the best applicants from a representative register.

ALJ Evaluation and Discipline

At present, ALJs, virtually alone among federal employees, are statutorily exempt from any performance appraisal. Although agencies may seek removal or discipline of ALJs "for good cause" by initiating a formal proceeding at the MSPB, the Board has applied standards that have strictly limited the contexts in which such actions may successfully be taken against an ALJ. For example, agency actions premised on low productivity have never been successful before the Board.

The Conference recognizes the importance of independence for ALJs. Their role under the APA as independent factfinders requires that they be protected from pressure in making their decisions. There can be a tension, however, between this independence and the agency's role as final policymaker, including the need for consistency of result and political accountability. Moreover, agencies have a legitimate interest in being able to manage their employees, including ALJs, in order to ensure that the adjudicatory system is an efficient and fair one.

The Conference, therefore, recommends that a system of review of ALJ performance be developed. Chief ALJs would be given the responsibility to coordinate development of case processing guidelines, with the participation of other agency ALJs, agency managers and others. These guidelines, which would address issues such as ALJ productivity and step-by-step time goals,[7] would be one of the bases upon which Chief ALJs would conduct regular (e.g., annual) performance reviews. Judicial comportment and demeanor would be another basis for review. Another factor on the list of bases for performance review, which list is not intended to be exclusive, would be the existence of a clear disregard of, or pattern of nonadherence to, properly articulated and disseminated rules, procedures, precedents and other agency policy. Such performance review systems need not involve quantitative measures or specific performance levels, but they should provide meaningful and useful feedback on performance.[8]

Conversely, ALJs should also have a mechanism for dealing with legitimate concerns about improper agency infringement of, or interference with, their decisional independence. Under the Conference's recommendation, each agency employing ALJs should set up a system for receiving and investigating allegations of such activity by agency management officials, and, where warranted, referring them to the appropriate authorities for action.[9] OPM would have oversight responsibility, and could, upon request by an ALJ or at its own discretion, review an agency's response to such allegations, and recommend appropriate further action.

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[7] See Conference Recommendation 86-7, "Case Management as a Tool for Improving Agency Adjudication," 1 CFR §305.86-7(1992), at ¶2.

[8] Many states now use performance reviews for their state court judges and ALJs. The performance of federal magistrate-judges is evaluated as a condition of reappointment. Even some federal courts are beginning to experiment with evaluation of judges' performance.

Under the Conference recommendation, the Chief ALJs' responsibilities would also include developing ALJ training and counseling programs designed to enhance professional capabilities and to remedy individual performance deficiencies, and, in appropriate cases, issuing reprimands or recommending disciplinary action.[10]

Recently, attention has been focused on allegations of prejudice against certain classes of litigants by some ALJs.[11] While there is no known evidence that such a problem is widespread, the Conference's view is that it is important to have a mechanism for handling complaints or allegations relating to ALJ misconduct, including allegations of bias or prejudice. The Conference, therefore, recommends that Chief ALJs, either individually or through an ALJ peer review group, receive and investigate such complaints or allegations, and recommend appropriate corrective or disciplinary actions. To the extent practicable, such investigation and the processing of any corrective or disciplinary recommendation should be expedited to protect affected interests and create public confidence in the process. Where appropriate, consensual resolutions are encouraged. The Conference also recommends that agencies publicize the existence of their complaint procedures, in published rules and procedures or in some other appropriate fashion, and inform complainants in a timely manner of the disposition of their complaints.

The Conference is also recommending that OPM assign the various responsibilities relating to ALJs to a specific unit within that agency. Such a unit would, among other things, have responsibility for overseeing personnel, hiring and performance matters involving Chief ALJs, thus providing them additional insulation from agency pressures. Because of the increased importance of the position of Chief ALJ under this proposal, Congress also should consider making the position subject to a term appointment, as it has done for Chief Judges of United States District Courts.

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[9] Such authorities might include OPM for certain lesser sanctions, and the Office of Special Counsel or MSPB in more serious cases.

[10] See 43 Op. Att'y Gen. 1 (1977) (discussing certain limitations on agency's authority to reprimand ALJs).

[11] See, e.g., U.S. GAO, SOCIAL SECURITY RACIAL DIFFERENCE IN DISABILITY DECISIONS WARRANTS FURTHER INVESTIGATION, GAO/HRD-92-56 (April 1992). Cf. Ninth Circuit Gender Bias Task Force, Preliminary Report (Discussion Draft) (July 1992) at 93-103 (discussing gender bias issues relating to disability determinations).

The Conference also recommends that proceedings before the Merit Systems Protection Board involving charges against ALJs be heard by a three-judge panel. Judging administrative law judges is a sensitive process, and the benefit of collegial decisionmaking in this context seems worth the added cost. The panel should be selected from a pool of ALJs. Currently, MSPB has only one ALJ. So long as this is the case, the pool should consist of ALJs from other agencies, but the panel in a particular case should not involve ALJs from the same agency as the respondent ALJ.

Policy Articulation

As discussed, the APA model of agency decisionmaking is based on the use of independent ALJs to find facts and to apply agency policy to those facts. This system requires that ALJs be granted independence as factfinders, but it also must ensure that agency policymakers are able to establish policies in an efficient manner for application by ALJs in individual cases. The methods available to agencies include promulgation of rules of general applicability, the use of a system of precedential decisions,[12] or other appropriate practices, such as proper use of policy statements.[13] Such policy statements must be properly disseminated.

Where the agency has made its policies known in an appropriate fashion, ALJs and AJs are bound to apply them in individual cases. Policymaking is the realm of the agency, and the ALJ's (or AJ's) role is to apply such policies to the facts that the judge finds in an individual case.

The Concept of an ALJ Corps

There has been over the last decade considerable discussion of the concept of an ALJ corps. Although there have been differences among the specific proposals, the concept in general includes separating ALJs from individual agencies, and placing them in a new, separate agency. Recent legislative proposals provided, among other things, that new ALJs would be selected by a chief judge of the corps, and that ALJs would be divided into several general subject matter divisions (such as health and benefits; safety and environment; and communications, public utility and transportation regulation).[14]

The Conference discussed these recent legislative proposals to establish a centralized ALJ corps as a means of handling some of the issues addressed in this recommendation. Some of these recommendations are independent of such proposals; others are inconsistent with them. The Conference concluded that there is no basis at this time for structural changes more extensive than those proposed here.

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[12] See Conference Recommendation 89-8, "Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions," 1 CFR §305.89-8 (1992) ¶1 at n. 2.

[13] See Conference Recommendation 92-2, "Agency Policy Statements," 57 Fed. Reg. 30101, 30103 (1992), to be codified at 1 CFR §305.92-2.

[14] See S. 826 and H.R. 3910, 102d Cong.

RECOMMENDATION

I. Congressionally Mandated Use of ALJs and AJs[15]

A. When Congress considers new or existing programs that involve agency on-the-record adjudications, it should seek to preserve the uniformity of process and of qualifications of presiding officers contemplated by the APA, by providing for the use of administrative law judges (ALJs) in all appropriate circumstances.[16] In order to further this goal, Congress should consider converting certain existing administrative judge (AJ) positions[17] to ALJ positions. In determining the appropriateness of converting existing AJ positions to ALJ status and of requiring the use of ALJs in particular types of new adjudications, Congress should consider the following factors, if present, as indicia to weigh in favor of requiring ALJ status:

1. The cases to be heard and decided are likely to involve:
    a. substantial impact on personal liberties or freedom;
    b. orders that carry with them a finding of criminal-like culpability;
    c. imposition of sanctions with substantial economic effect; or
    d. determination of discrimination under civil rights or other analogous laws.

2. The procedures established by statute or regulation for the cases heard and decided are, or would be, the functional equivalent of APA formal hearings.

3. The deciders in such cases are, or ought to be, lawyers--taking into consideration the possibility that some programs might require other

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[15] The recommendations in this Part I are interdependent with those of Parts II and III urging improvements in the selection and evaluation processes for ALJs.

[16] This recommendation is not intended to be seen as encouraging increased formalization of administrative adjudicatory processes.

[17] The term "administrative judge," as used here, includes non-ALJ hearing officers, whatever their title, who preside at adjudicatory hearings.

types of specialized expertise on the part of adjudicators or on panels of adjudicators.

4. Those incumbent AJs in such cases who are required to be lawyers already meet standards for independence, selection, experience, and compensation that approximate those accorded to ALJs.

B. When Congress determines that it should require ALJs to preside over hearings in specific classes of existing federal agency adjudications at which ALJs do not now preside, it should specify that those AJs presiding over such proceedings at that time who can satisfy the Office of Personnel Management's eligibility qualifications for ALJs be eligible for immediate appointments as ALJs.

C. Congress should provide that OPM should no longer be responsible for reviewing and ruling on agency requests for additional ALJ positions. Decisions relating to an agency's need for more or fewer ALJ positions should be made by the individual agencies through the normal resource allocation process.

II. ALJ Selection

A. Congress should authorize where required, and OPM should establish, a process for the selection of qualified ALJs by federal agencies that contains the following elements:

1. OPM should continue to administer the process for determining whether applicants are qualified to be on the register of eligibles for ALJ positions and for rating such applicants. OPM should ensure that all applicants appearing on the register are in fact qualified to fulfill the duties of an ALJ under applicable law, including that they have the capability and willingness to provide impartial, independent factfinding and decisionmaking. To the extent that this may require revising the examination process, OPM should make the appropriate changes.

2. Those applicants determined by OPM to be qualified should be listed on the register with their numerical scores noted. Agencies seeking to fill ALJ positions should be allowed to request a certificate containing the names of those applicants whose numerical ratings place them in the highest-ranked 50 percent of the register of eligible applicants. Agencies should have the discretion to request a certificate with a smaller number or percentage of the register. Agencies should also be given access to a computerized database containing the complete application files of those applicants on the certificate.

3. A hiring agency should be permitted to select any applicant from the certificate who, in the agency's opinion, possesses the qualifications for the particular position to be filled. An agency may request that OPM

provide an additional number of names upon a showing of exceptional circumstances.

B. OPM and the hiring agencies should give a high priority to expanding recruitment of women and minority applicants for ALJ positions. OPM also should review its ALJ application criteria to determine whether its current method of assessing litigation experience is appropriate.

C. OPM immediately should implement Parts II(A)(1) and (B), which may involve revisions to the examination or scoring process. Pending implementation of the other recommendations in this Part, OPM should open the register application process as soon as possible, and keep it open continuously.

D. In order to implement the proposals in paragraphs II(A) and (B) above, Congress should abolish the veterans' preference in ALJ selection.

III. ALJ Evaluation and Discipline

Congress should authorize, where necessary, and OPM and the agencies that employ ALJs should establish, the following processes for assisting ALJs and the agencies that employ them to carry out their responsibilities to the public and to individual parties:

A. Organization

1. OPM should assign a specific unit the responsibility for (a) overseeing those matters concerning the selection of ALJs, (b) overseeing all personnel, hiring and performance matters that involve Chief ALJs, (c) acting on allegations of improper interference with decisional independence of ALJs, (d) conducting regular performance reviews of Chief ALJs, and (e) periodically publishing reports on the effectiveness with which OPM's responsibilities are performed and seeking recommendations as to how the program may be improved.

2. Each agency that employs more than one ALJ should designate a Chief ALJ, who is given the responsibility within the agency to do the tasks assigned to the Chief ALJ under this Part III.[18]

3. OPM should provide guidance and assistance to aid Chief ALJs fulfilling the responsibilities given to them under this Part III.

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[18] In agencies with large numbers of ALJs, the Chief ALJ might appropriately delegate some or all such responsibility to deputy or regional chief ALJs.

4. OPM and the agencies should ensure that Chief ALJs are insulated from improper agency influence when carrying out the responsibilities described in this Part III.[19]

B. Evaluation and Training

Chief ALJs should be given the authority to:

1. Develop and oversee a training and counseling program for ALJs designed to enhance professional capabilities and to remedy individual performance deficiencies.
2. Coordinate the development of case processing guidelines, with the participation of other agency ALJs, agency managers and, where available, competent advisory groups.
3. Conduct regular ALJ performance reviews based on relevant factors, including case processing guidelines, judicial comportment and demeanor, and the existence, if any, of a clear disregard of or pattern of nonadherence to properly articulated and disseminated rules, procedures, precedents, and other agency policy.
4. Individually, or through involvement of an ALJ peer review group established for this purpose, provide appropriate professional guidance, including oral or written reprimands, and, where good cause appears to exist, recommend that disciplinary action against ALJs be brought by the employing agency at the Merit Systems Protection Board (MSPB), based on such performance reviews.

C. Complaints About ALJs

Each agency that employs ALJs should set up a system for receiving and evaluating complaints or allegations of misconduct by an ALJ, including bias or prejudice.

1. The Chief ALJ in each agency, individually or through involvement of an ALJ peer review group established for this purpose, should be given responsibility for receiving and investigating such complaints.
2. If a Chief ALJ determines that ALJ misconduct occurred, the Chief ALJ should recommend that the agency take appropriate corrective action, or, in appropriate cases, recommend that disciplinary action against the ALJ be brought by the agency at the MSPB.
3. If a Chief ALJ determines that further investigation by another authority is warranted, he or she should refer the case to that authority.

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[19] Congress also should consider making the position of Chief ALJ subject to a term appointment. This suggestion does not result from a finding by the Conference that any number of current Chief ALJs are not functioning effectively. The Conference notes, however, that Chief Judges of United States District Courts are subject to term appointments and believes it is appropriate to consider whether a similar limitation should apply to Chief ALJs.

4. Each agency should make known to interested persons in an appropriate fashion the existence of such complaint procedure.

5. Where allegations of misconduct implicate a Chief ALJ, they should be referred to OPM for such investigation and recommended action.

6. Complainants should be given notice of the disposition of their complaints.

D. Complaints by ALJs

Each agency that employs ALJs should set up a system for receiving and investigating allegations of unlawful agency infringement on ALJ decisional independence or other improper interference in the fulfillment of ALJ responsibilities. Such a system should be be subject to OPM oversight. Where investigation reveals the probable occurrence of such an impropriety, the matter should be referred to the appropriate authority for review and recommended action designed to remedy the situation and prevent recurrence, including the issuance of oral or written reprimands and other appropriate sanctions.

E. MSPB Panels

MSPB should assign cases involving charges against ALJs to a three-judge panel of ALJs drawn from a pool. No judge on the panel should be from the same agency as the respondent ALJ.

IV. Policy Articulation

To ensure that ALJs and affected persons are aware of their responsibilities, agencies should articulate their policies through rules of general applicability, a system of precedential decisions, or other appropriate practices.[20] Congress, the President, and the courts should encourage such policy articulation.

V. The Concept of an ALJ Corps

Congress should not at this time make structural changes more extensive than those proposed here, such as those in recent legislative proposals to establish a centralized corps of ALJs.

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[20] See generally Conference Recommendation 71-2, "Articulation of Agency Policies," 1 CFR §305.71-2 (1992); Conference Recommendation 87-7, "A New Role for the Social Security Appeals Council," 1 CFR §305.87-7 (1992); Conference Recommendation 89-8, "Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions," 1 CFR §305.89-8 (1992); Conference Recommendation 92-2, "Agency Policy Statements," 57 Fed. Reg. 30101, 30103 (1992), to be codified at 1 CFR §305.92-2.

Recommendation 92-8

Administration of the Office of Juvenile Justice and Delinquency Prevention's Formula Grant Program

In 1974 Congress enacted the Juvenile Justice and Delinquency Prevention ("JJDP") Act, which created the Office of Juvenile Justice and Delinquency Prevention ("OJJDP" or "the Office") within the U.S. Department of Justice. Among OJJDP's responsibilities, then and now, is that of administering a program of formula grants to states and local governments. While the overall purposes of the formula grant program were broadly framed,[1] the statute also required states to achieve several very specific substantive outcomes. Compliance with those mandates,[2] as well as with a variety of other administrative and procedural requirements, continues to determine eligibility for formula grant funds from OJJDP.

Monitoring for levels of state compliance, determining grant eligibility status, reviewing submitted plans and reports, and responding to technical assistance requests all fall to OJJDP's State Relations and Assistance Division (SRAD). Its administration of the formula grant program is guided by a substantial body of regulations, rules, policies and interpretations that OJJDP has developed over the years. Mechanisms such as waivers, exceptions, and de minimis criteria--characteristic features of many regulatory and grant programs--have been adopted by either Congress or the agency over the years.

The Conference, in response to a request from OJJDP, studied OJJDP's administration of the formula grant program, including its efforts to monitor and assist state compliance with the statutory mandates and requirements. As part of this study, the Conference examined issues of communication and consultation with states, coordination and collaboration at various levels of government, consistency and clarity of policy elaboration, staffing, and training.

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[1] Funds may be used for a broad variety of programs and services related to juvenile justice and the treatment and prevention of juvenile delinquency. State participation in the formula grant program is strictly voluntary, with state funding levels determined on the basis of relative population under age 18.

[2] The three substantive mandates are as follows:

1. Juveniles who are accused or convicted of status offenses (conduct not considered criminal if committed by an adult, such as running away or truancy) and nonoffenders (such as abused, dependent, or neglected children) must not be placed in secure detention or secure correctional facilities.

2. Juveniles who are accused or adjudicated of delinquency or status offenses must not have regular contact with incarcerated adults where both juveniles and adults are confined in the same institution.

3. No juvenile may be detained or confined in any adult jail or lockup.

RECOMMENDATION

1. Policymaking

(a) The Department of Justice should ensure that overall policy, priorities, and objectives for all federal juvenile delinquency programs and activities are coordinated so that related activities and programs advance efforts by OJJDP and the states to achieve and maintain compliance with the substantive mandates of the JJDP Act.

(b) OJJDP should (1) create, and ensure adherence to, internal operating guidelines and (2) assign formula grant staff responsibilities, so that important issues of policy or interpretation are identified and dealt with promptly. Once such an issue has been finally resolved, the Office's policy or interpretation should be made available promptly by appropriate means--whether the Federal Register or otherwise--to all state juvenile justice specialists,[3] the National Coalition of State Juvenile Justice Advisory Groups,[4] and other groups and entities, that may have a substantial interest in the policy or interpretation.

(c) In all instances where issues of policy or interpretation may substantially affect interested persons or organizations or the interests of one or more states, the Office should engage in pre-decisional consultation with the affected persons or entities. OJJDP, in selecting a mode of consultation, should take into account the scope and impact of the policy or interpretation and other matters relevant to effective communication of views and efficient decisionmaking.

(d) The Office should ensure that the reasons underlying its policies and interpretations, including changes and clarifications, are clearly explained in documents announcing them.

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[3] State juvenile justice specialists serve as the states' primary staff liaison with OJJDP.

[4] The Coalition consists of the members of the state advisory groups that are appointed by the governors of all states participating in the formula grant program. The JJDP Act provides for the Coalition to play an advisory role to Congress and the Administrator of OJJDP on program operations and related matters.

(e) The Office should develop adequate internal procedures to ensure that consistent advice regarding the requirements applicable to the formula grant program is afforded to affected states by the OJJDP state representatives.

2. OJJDP Staffing

(a) The Office should have a general attorney assigned primarily to advising OJJDP state representatives,[5] the SRAD Director, and OJJDP's Administrator concerning general legal issues arising in OJJDP's grant administration.

(b) The Office should take steps to ensure that the evaluation of monitoring data and other information relevant to determining compliance and waiver of grant termination is even-handed and takes into full account Office policies and interpretations. In so doing, the Office should consider reestablishing the position of "monitoring coordinator."

(c) The Office should refrain from so frequently shifting the state assignments of the OJJDP state representatives that the value of familiarity with state programs is lost.

3. Background and Training of OJJDP and State Formula Grant Personnel

(a) The Office should accord due weight to prior general training or experience in the area of juvenile justice and grants management in hiring applicants for the position of state representative.

(b) The Office should train both new and experienced state representatives to ensure that they:

(i) are fully informed with regard to their roles and responsibilities;

(ii) have adequate knowledge regarding the Office's procedures and practices for the conduct of their work;

(iii) have a firm working knowledge of the relevant state and federal statutes, regulations, and guidelines applicable to the formula grant program; and

(iv) are kept apprised of recent developments in relevant Office policy and in the area of juvenile justice generally that may affect their work as state representatives.

(c) The Office should ensure that adequate training is provided to states' juvenile justice specialists for their role in the implementation of the formula grant program. This should include regularly scheduled training programs for new and experienced state juvenile justice specialists. The programs should (i) be timed so that necessary training is provided soon after new specialists take their positions, and (ii) make sure that training materials are updated expeditiously to reflect new developments in Office policy and interpretation, juvenile justice generally, and state compliance efforts.

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[5] OJJDP state representatives serve in a liaison role between OJJDP and the states, communicating and interpreting federal policy, reviewing state plans and performance, and providing technical assistance to state agencies.

4. Information Dissemination to States

(a) As part of its research and program development functions, the Office should collect information that may be helpful to the states in complying with the statutory mandates; the Office should disseminate this information to state juvenile justice specialists in a timely fashion and accessible format.

(b) The Office should create procedures to ensure that states will be (i) fully consulted in a timely manner regarding applications for special emphasis grants awarded to projects in their respective jurisdictions and (ii) regularly informed about the progress, results, and lessons of those projects.

(c) The Office should advise all states in a timely fashion concerning promising approaches to achieving and maintaining compliance with the substantive mandates of the JJDP Act.

(d) The Office should ensure that state-submitted monitoring data and other information by which it determines compliance and waiver are widely available both to the states and the public generally.

(e) A study should be undertaken to determine whether restructuring of, or improving communications between, the four divisions that have responsibilities for establishing juvenile delinquency and prevention programs, evaluating effective strategies, fostering promising approaches, and disseminating information would help the Office achieve its goals.

5. Enforcement and Administration

To enhance administration of the program, Congress should repeal the existing provision of the JJDP Act that authorizes waiver of the requirement that states submit annual monitoring reports to OJJDP. It should also retain the current requirement that the Office periodically audit state monitoring systems to ensure their reliability.

Recommendation 92-9

De Minimis Settlements Under Superfund

In the last decade, following the passage in 1980 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[1] commonly referred to as Superfund, the nation has begun focusing its attention on the cleanup of hazardous waste sites. The task is a daunting one. There currently are approximately 1200 sites on the National Priorities List (NPL), the list of most hazardous sites, and it is likely that many more will be added to this list in the coming decades. The average cleanup cost at each of these sites is about $25 million. The aggregate cost of remedying the hazardous waste problem has been placed at several hundred billion dollars.

Joint and several liability for these cleanup costs has been imposed on a very broad set of parties--practically any party that had any connection with hazardous substances placed at a site in need of a cleanup, as well as owners and operators of contaminated facilities. Potentially responsible parties, known as PRPs, at typical Superfund sites include not only large industrial firms, but an array of small entities. Under the governing contribution rule, responsibility does not depend on the size of the firm, but rather depends generally on the firm's hazardous waste contribution at the site. Some PRPs therefore bear a large share of the liability at a site because they generated a large proportion of the hazardous substances. Other PRPs, which generated a relatively small proportion, may be responsible for only a few thousand dollars in cleanup costs. The process for apportioning the cleanup costs at a site gives rise to substantial transaction costs, principally legal fees and technical consulting costs. Parties that are responsible for only a small share of the cleanup costs might have to disburse several times this amount in transaction costs.

Congress expressed concern about this situation in 1986 when it reauthorized the program and substantially amended the statute. The Superfund Amendments and Reauthorization Act of 1986 (SARA),[2] included provisions designed to make it easier for such "de minimis parties" to enter into early settlements with EPA, thereby limiting their transaction costs.

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[1] Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§9601-9675).

[2] Pub. L. No. 99-499, 100 Stat. 1613 (1986). This law generally reflects the pro-negotiation approach urged by the Conference in Recommendation 84-4, "Negotiated Cleanup of Hazardous Waste Sites under CERCLA" (1984).

SARA set forth a far-reaching scheme for imposing liability for the cleanup of hazardous waste sites. The liability provisions are triggered by the release or threat of release of hazardous substances into the environment. For each site, the statute establishes four categories of liable parties: the generators of the hazardous substances present at the site, the transporters of these substances to the site, the current owner of the site, and prior owners during whose period of ownership there was disposal of hazardous substances at the site.[3] These parties are liable for the costs of cleanup of the site, as well as for damage to natural resources under the control of the federal or state governments, or Indian tribes.[4]

The language of the statute has the effect of imposing a strict liability rather than a negligence standard. Moreover, current law holds parties jointly and severally liable if the harm at the site is indivisible. Under the statute, PRPs held jointly and severally liable can seek contribution from other PRPs. The existence of joint and several liability is significant in the Superfund context because, given the significant periods of time--often several decades--between the disposal of hazardous substances and the cleanup, it is particularly likely that some liable parties will not be found, or will be insolvent. The remaining PRPs will then have to bear a disproportionate share of the costs.

The statute provides a limited set of defenses. Generally, a party can escape liability only if it can show by a preponderance of the evidence that the release or threat of release was caused solely by an act of God, an act of war, an act or omission of a third party, or a combination of these causes. Only the third-party defense has been of practical significance. In addition to showing causation by a third party, a PRP seeking to escape liability must show that (i) it took due care with respect to the hazardous substances, (ii) it took precautions against foreseeable acts or omissions of the third party, and (iii) such acts or omissions did not occur in connection with a contractual relationship with the PRP. So, for example, a generator cannot escape liability simply by showing that the problem was caused by the transporter with which it contracted for the disposal of the wastes.

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[3] 42 U.S.C. §9607(a). Under a limited set of circumstances a prior owner can be liable even if there was no disposal during its period of ownership. Liability will attach if the prior owner had actual knowledge of the release or threatened release when it owned the property, and transferred it without disclosing such knowledge. 42 U.S.C. §9607(35)(C).

[4] 42 U.S.C. §9607(a), (f)(1).

To understand the context for de minimis settlements, it is important to review both the process of cleanup of hazardous waste sites and the allocation of responsibility for this cleanup among EPA and the PRPs. One of the most compelling reasons for offering early settlements to parties who bear only a small share of the liability is the very long time (averaging 12 years) that elapses between the discovery of a site and its ultimate cleanup. Settling with de minimis parties relatively early in this process can save them substantial legal and consulting costs.

The allocation of responsibility between EPA and the major PRPs at a particular site is also of critical importance. Many of the issues raised by a de minimis settlement concern its effect on subsequent settlements pursuant to which the major parties agree to undertake the cleanup of the site.

The early stages in the Superfund process involve the screening of sites to determine which pose the most serious health problems, and should therefore become the focus of EPA's attention. The later stages involve the cleanup of these sites. Obviously, the call for de minimis settlements during the early stages of the process is more compelling because the process is a slow one.

Congress translated these concerns into statutory provisions encouraging settlements in general[5] and de minimis settlements in particular.[6] With regard to de minimis settlements, the statute provides that "whenever practicable and in the public interest," the Administrator "shall as promptly as possible reach a final settlement with a potentially responsible party . . . if such settlement involves only a minor portion of the response costs at the facility." In addition, to qualify for de minimis status, generators and transporters must show that the amount and the effect of their hazardous waste contribution are both minimal in comparison to other hazardous substances at the facility.

Landowners constitute a unique class of PRPs. They may invoke an "innocent landowner" third-party defense to escape liability if they can establish that they (i) "did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility," (ii) "did not contribute to the release or threat of release of a hazardous substance at the facility through any act or omission," and (iii) purchased the property without "actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substances." If they elect, instead of pursuing this defense, to limit their liability by a settlement, they may do so. Since such settlements are entered into under the statutory provisions applicable to de minimis settlements, these landowners are customarily referred to as "de minimis landowner" PRPs.

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[5] 42 U.S.C. §9622.

[6] 42 U.S.C. §9622(g).

This recommendation identifies several procedural steps that can be taken by the Environmental Protection Agency to improve the functioning of the de minimis settlement program.

As a general principle, EPA should establish procedures and incentives to negotiate de minimis settlements as a standard practice at all multi-party Superfund sites involving de minimis parties. The Conference's study indicates that the vast majority of de minimis settlements have been entered relatively late in the process, and that the majority of the regional offices have shown little interest in undertaking earlier settlements. They frequently have favored resolving the liability of de minimis parties as part of global settlements pursuant to which the major parties undertake cleanups by requiring de minimis parties to negotiate directly with the major parties to determine their contribution to the cleanup cost. Paragraph 1 expresses the Conference's belief that transaction costs can be reduced significantly by settling with de minimis parties rather than seeking de minimis settlements as part of a global settlement.

The predominant approach to de minimis settlements taken by EPA regional offices has been to wait for groups of de minimis parties to form and take the first step in proposing settlements. However, the formation of such groups requires the expenditure of transaction costs by private parties and can take considerable time, and such groups might not represent the smaller de minimis parties that have the greatest interest in settlement. Paragraph 2 recommends that EPA's regional offices take a more active role in seeking such settlements. The Conference also recognizes, however, that reasonable limitations on the negotiation process may be appropriate to avoid unduly protracted negotiations.

The study found significant differences in the approaches of the regional offices, and even across sites in the same region, due to the lack of concrete guidance on several important issues. Perhaps the most significant example is the variation in the volumetric determinant used to determine de minimis status. This lack of uniformity increases the incentives for parties to protest the terms of individual settlements, and increases the probability that such settlements could be successfully challenged in court. Paragraph 3(a) addresses this concern.

Paragraph 3(b) recognizes that, while current policy guidelines on de minimis landowner settlements contemplate some payment, they do not specify either how to compute this payment or its relationship to estimated costs of cleanup. Such guidelines are necessary because the current "innocent landowner" guidance does not provide any assistance to the regional offices in determining an appropriate settlement figure for such landowners.

Currently, settlement documents are dispersed throughout the regions, making it difficult to determine both the extent to which de minimis settlements are used and the content of the settlements reached. Assurance that similarly situated parties are treated similarly requires knowledge of what actual practice has been, and any efforts to standardize the practice would benefit from knowledge of the variants already employed. Paragraph 3(c) urges creation of a central repository of such documents to address this need.

The explanation given most frequently by the regional offices as to the impracticality of early de minimis settlements is the lack of sufficiently reliable information on cleanup costs. EPA's recent guidance document has attempted to deal with this question on a regional level. Paragraph 4(a) suggests that this task is better accomplished on the national level. In general, there is no reason for a regional office to confine itself to its own sites in determining the costs of similar cleanups, as the inventory of comparable sites that have progressed sufficiently in the cleanup process may be small or nonexistent. Furthermore, there is no central repository for de minimis settlement documents, which might contain relevant data, and no EPA database contains their full terms. While this information can generally be obtained from the individual regional offices, this process is cumbersome and time-consuming.

An element over which there is substantial conflict among EPA and the de minimis and major parties is the premium to be charged in exchange for a waiver of any cost overrun and the risk that future events may trigger the possibility of further action by EPA against a party that has already settled ("reopeners"). The study found wide variation, ranging from approximately 50% to 250%, not readily explained merely by the different stages at which the settlements were entered. Moreover, there does not appear to be a standardized method for calculating premiums. Paragraph 4(b), like paragraph 3(a), is intended to reduce the potential for conflict by standardizing the approach.

In general, earlier settlements will be based on less accurate estimates of ultimate cleanup costs than settlements reached at later stages of the process. Paragraph 4(c) suggests that settlements, at the time they are reached, should represent a fair allocation of expected burdens.

The study found some evidence of confusion as to whether EPA can set up an account to finance a cleanup in cases in which it will not perform the cleanup itself and negotiations with the major parties are not sufficiently advanced. In these cases, the funds are generally placed in the Superfund and are not made available to finance a later cleanup by the major parties. These parties, understandably, object to this outcome, and the resulting friction is one of the reasons why several of the regional offices favor global settlements. Paragraph 5 suggests that EPA headquarters seek mechanisms to provide that an appropriate portion of the proceeds from de minimis settlements benefit the parties that take responsibility for the cleanup. Appropriate benefits might include amounts paid for future cleanup costs and premium payments.

RECOMMENDATION

1. EPA should make further efforts to establish procedures and incentives to negotiate de minimis settlements as a standard practice at all multi-party Superfund sites involving de minimis parties. EPA should not rely on global settlements as the preferred mechanism for resolving the liability of de minimis parties.

2. EPA's regional offices should actively seek de minimis settlements by informing potentially responsible parties (PRPs) of their potential eligibility and circulating a draft settlement agreement as soon as the required statutory findings can be made.[7] These steps should be taken as soon as is practicable, but in any event no later than the time EPA completes the "waste-in list," which identifies the type and quantity of waste contributed to a site by each PRP. In undertaking settlement negotiations with de minimis parties, EPA regional offices should be permitted to impose reasonable limitations on the negotiation process.

3. EPA headquarters should:

(a) make further efforts to standardize the general terms of de minimis settlements and should establish a procedure to determine site-specific terms,

(b) provide guidelines for the determination of appropriate payments and terms in de minimis landowner settlements, and

(c) create and maintain a central repository of de minimis settlement documents, readily accessible to the public.

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[7] See 42 U.S.C. §9622(g).

4. To facilitate de minimis settlements, EPA headquarters should:

(a) establish a database and methodology to assist and guide the regional offices in estimating site cleanup costs,

(b) establish principles for determining premiums (additional fees charged to settling parties in exchange for immunity against reopening of their cases) applicable at different stages in the process, and

(c) make clear that regional offices should seek settlements that, at the time of settlement, represent a fair allocation of expected burdens.

5. To enhance the acceptability of de minimis settlements, EPA headquarters should, to the extent permitted by law, establish mechanisms to ensure that the parties that take responsibility for the cleanup receive appropriate benefits from the proceeds of de minimis settlements.

REPORTS FOR RECOMMENDATIONS 92-1 THROUGH 92-9

Report for Recommendation 92-1

The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

I. Introduction

The Administrative Procedure Act, 5 USC §553, contains the procedural requirements for notice-and-comment rulemaking. It requires that an agency generally publish notice and provide opportunity for public comment before adopting a rule. The section does provide for several specific exceptions. Under subsection (b)(A), for example, the requirements for notice and comment do not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . . ." An even broader exception is provided for "a matter relating to agency management or personnel . . . . "[1]

The scope of APA exceptions has been described as "enshrouded in considerable smog,"[2] and the question of what is a procedural or practice rule[3] has no clear answer. The issue is currently in a state of flux, in part as a result of the decision of the Court of Appeals for the District of Columbia Circuit in *Air Transport Association v. Department of Transportation.*[4] In that case, the court held that rules establishing the procedures for adjudicatory hearings under the Federal Aviation Administration's administrative civil penalty program were not exempt as procedural rules from the APA's notice-and-comment requirements. Stating that the procedural rule exception applied to "housekeeping" rules and was reserved for rules organizing an agency's "*internal* operations",[5] the court held that the FAA regulations "encoded a substantive value judgment" by "substantially affect[ing] a civil penalty defendant's *right to an administrative adjudication.*"[6] Abjuring the distinction between "procedure" and "substance," the court distinguished instead among "rules affecting different *subject matters*--'the rights or interest of regulated' parties, . . . and agencies' 'internal operations'. . . ."[7] A strong dissent decried the majority's "abandon[ment]" of the "procedural/substantive" dichotomy, and instead proposed a test of whether the rule regulates "primary conduct."[8] The Supreme Court accepted the government's petition for *certiorari* in the case, but subsequently vacated the lower court's decision and remanded it for consideration of the issue of mootness. Thus, the questions remain unsettled.[9]

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[1] 5 USC §553 (a)(2). This provision exempts such rules not only from notice-and-comment requirements, but from all of section 553, including its requirement to publish with a statement of basis and purpose.

[2] *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975); *see also Community Nutrition Institute v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987).

[3] The term "procedural rule" as used here refers generally, as do most courts that have considered the subject, to "rules of agency organization, procedure or practice."

[4] 900 F.2d 369 (D.C. Cir. 1990), *cert. granted*, 111 S.Ct. 669 (1991), *judgment vacated and remanded*, 111 S. Ct. 944 (1991). The case was remanded to the court of appeals for a determination of mootness. The court of appeals vacated the opinion and dismissed the petition for review as moot. 1991 U.S. App. Lexis 11400 (June 4, 1991).

[5] *Id.* at 376. (Emphasis in original.)

[6] *Id.* (Emphasis in original.)

The Conference has already addressed the scope of most of the other major exceptions to the APA rulemaking requirements.[10] Because the procedural rule exception is increasingly a subject of controversy, this would be an appropriate time for the Conference to consider filling this gap in its recommendations.

II. The APA Requirements

As noted, section 553 (b)(A) of the APA exempts from notice-and-comment requirements "rules of agency organization, procedure or practice." The statute does not define those terms explicitly. It does, however, in a separate subsection of section 553, exempt from the entire section rules involving "matters of agency management or personnel."[11] Because agency "housekeeping rules" would seem to fall within this latter, broader exemption for rules involving agency management, it does not seem consistent with either logic or grammar to limit the procedural rule exemption to housekeeping rules.

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[7] *Id.* at 378.

[8] *Id.* at 382 (Silberman, J.).

[9] While the opinion was vacated and the case dismissed on mootness grounds, the D.C. Circuit's decision on the merits may continue to have precedential weight. *See, e.g., Action Alliance of Senior Citizens v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir. 1991) (decision vacated on other grounds continues to have precedential weight on other issues in absence of contrary authority); *Hopkins v. Price Waterhouse*, 920 F.2d 967, 975 & n.5 (D.C. Cir. 1990); *Christianson v. Colt Industries Operating Corp.*, 870 F.2d 1292, 1298 (7th Cir.), *cert. denied*, 110 S. Ct. 81 (1989) ("although vacated, the decision stands as the most comprehensive source of guidance available on the . . . questions at issue in this case"); *U.S. ex rel. Espinoza v. Fairman*, 813 F.2d 117 (7th Cir.), *cert. denied*, 107 S. Ct. 3240 (1987) (decision vacated by the Supreme Court remains persuasive precedent so long as the Court did not reject its underlying reasoning).

[10] Recommendation 69-8, "Elimination of Certain Exemptions from the APA Rulemaking Requirements, 1 CFR §305.69-8; Recommendation 73-5, "Elimination of the 'Military or Foreign Affairs Function' Exemption From APA Rulemaking Requirements," 1 CFR §305.73-5; Recommendation 76-5, "Interpretive Rules of General Applicability and Statements of General Policy," 1 CFR §305.76-5; Recommendation 83-2, "The 'Good Cause' Exemption from APA Rulemaking Requirements," 1 CFR §305.83-2.

[11] 5 USC §553(a)(2).

Furthermore, the Attorney General's Manual on the APA, a document whose importance in understanding the APA has long been recognized, treats "rules of agency organization, procedure, or practice" as coextensive with the rules required to be published in section 552(a)(1), stating: "[T]he rules of organization and procedure which an agency must publish pursuant to section [552](a)(1) and (2) are not ordinarily subject to the requirements of section [553](a) and (b)."[12] Section 552(a), at the time it was enacted, applied to:

> (1) descriptions of [an agency's] central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; [and] (2) statements of the general course and method by which its functions are channeled and determined, including the *nature and requirements of all formal or informal procedures available* as well as forms and instructions as the scope and contents of all papers, reports, or examinations.[13]

Thus, as originally enacted and interpreted, the APA's procedural rule exemption appears to cover a much broader range of rules than only "housekeeping" rules. Procedural rules of the type at issue in the *ATA* case (i.e., rules governing adjudicatory procedures) would seem to fit within the terms of the statutory exemption.

III. Judicial Interpretations

There are a relatively small number of significant cases on the scope of the procedural rule exemption, and they are not particularly consistent. The problem in this area, as in other areas of law, is that the boundaries of what is procedure and what is substance are not always clear. Most courts have recognized the difficulty of the analysis, and some courts, such as the D.C. Circuit in the *ATA* case, have substituted other (and to us, nonstatutory) tests. Some of the different ways that courts have sought to analyze the issue are summarized below.

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[12] Attorney General's Manual on the Administrative Procedure Act (1947) at 30, *reprinted in* ACUS FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK. Sections 553(a) and (b) contain the requirements for notice and for opportunity for public comment in informal rulemaking.

[13] Emphasis added. Section 552 has since been amended. The original provision in section 3 of the APA (section 552) is, however, instructive in determining the original intention.

A. "Procedural means procedural"

A literal analysis of whether a particular rule comes within the "procedural rule" exemption is to determine whether it addresses some sort of agency procedure. The Ninth Circuit took this approach in *Southern California Edison Co. v. FERC*,[14] when it reviewed FERC rules establishing procedures for approving certain types of rates. Rejecting an argument that the rules should be subject to notice-and-comment requirements because they had a "substantive effect," the court held that the exemption extended to "technical regulation of the form of agency action and proceedings." Since the regulations "pertain[ed] to the procedural aspects of FERC's approval of . . . rates: intervention, requests for refunds for interim rates and for final confirmation and approval,"[15] the court found that they fell within the APA exemption.

B. "Substantial impact"

Other courts, recognizing that substance can wear a procedural face in some circumstances, and that certain rules that appear or are called procedural can affect substantive rights, have developed a "substantial impact" standard for determining whether a rule should be exempt from notice and comment. This test, which apparently first surfaced in *National Motor Freight Association v. United States*,[16] would subject a rule otherwise covered by one of the APA exemptions to notice-and-comment procedures if it has a "substantial impact" on the regulated community or their rights and interests.[17] The focus of this test is on the *magnitude* of a rule's impact, not on the *nature* of that impact. If that magnitude passed some undefined threshold, a procedural rule would require notice and comment prior to promulgation.[18] Although several courts have used the substantial impact test, it has generally lost favor, at least as the sole criterion for determining whether notice and comment should be required, although it has still not been completely abandoned.[19]

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[14] 770 F.2d 779 (9th Cir. 1985).

[15] *Id.* at 783.

[16] 268 F. Supp. (D.D.C. 1967)(three-judge panel), *aff'd mem.*, 393 U.S. 18 (1968).

[17] E.g., *Brown Express, Inc. v. United States*, 607 F.2d 695 (5th Cir. 1979).

[18] The test has also been applied in the context of interpretive rules, *e.g.*, *Pickus v. U.S. Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974).

[19] In fact, the majority in *ATA* noted that the FAA rules of practice "substantially affect a civil penalty defendant's right to an administrative adjudication." 900 F.2d at 376.

C. "Encoding a substantive value judgment"

Perhaps recognizing that a test based totally on magnitude of impact is unsatisfactory in analyzing whether a rule was a "procedural rule," several D.C. Circuit cases have used a test that involves a determination whether the particular rule "encodes a substantive value judgment." This test originated in *American Hospital Association v. Bowen.*[20] The court there noted that exceptions to the notice-and-comment requirements are narrow ones, and should be confined narrowly in light of the purposes of notice and comment. Those purposes are "to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies" and to "assure that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions."[21] In the context of the procedural rule exception, the court noted a shift from the "substantial impact" test toward determining whether "the agency action also encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior."[22]

In *AHA*, the court approved as "procedural" a number of agency directives and transmittals relating to the operation of the Medicare program's peer review organization system. These documents contained a "wide variety of instructions, guidelines and procedures covering aspects of the PRO program."[23] Many of them related to enforcement strategy, and contained fairly specific standards for what kinds of activity by hospitals would result in PRO review.[24] The court did not explain how the "encodes a substantive value judgment" test it had just developed should be applied, but rather simply concluded that new substantive burdens would not result from the rules.

Shortly thereafter, the D.C. Circuit applied the *AHA* "encoding" test, but with a different result, in *Reeder v. FCC.*[25] That case involved FCC procedures for allowing radio stations to request channel upgrades. The court held that amended procedures, which related to the timing of applications, had the effect of changing the substantive criteria for substituting (and thereby upgrading) channel allotments assigned to license holders. Because the

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[20] 834 F.2d 1037 (D.C. Cir. 1987).

[21] *Id.* at 1044, quoting *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980), and *Guardian Federal Savings & Loan Corp. v. FSLIC*, 589 F.2d 658, 662 (D.C. Cir. 1978).

[22] *Id.* at 1047. The court gave no citation for the origin of this test.

[23] *Id.* at 1043.

[24] The court noted that agency enforcement plans warrant considerable deference. *Id.* at 1050.

[25] 865 F.2d 1298 (D.C. Cir. 1989).

"procedures" were determined to have a substantive effect, the court insisted on notice and comment.

The *Air Transport Association*, or *ATA* case, discussed above, is perhaps the most recent "encoding" case. As described, the case involved the FAA's rules of practice for the formal adjudications of administrative civil penalties in cases involving violations of air safety regulations. The rules addressed such matters as discovery, briefing, and evidentiary issues. While the content of some of the rules was fairly controversial, they were clearly a set of practice rules relating to the enforcement proceedings themselves. The rules did not address the air safety regulations that were being enforced through civil penalties.

Nonetheless, the court eschewed any attempt to distinguish whether the rules were "procedural" or "substantive," opting instead for what it termed a "functional analysis."[26] The court's primary ground for holding that the rules at issue fell outside of the exemption was that "they substantially affect a civil penalty defendant's *right to an administrative adjudication*."[27] The court held that the FAA, in drafting these rules of practice, made choices concerning what process civil penalty defendants were due. "Each one of these choices 'encode[d] a substantive value judgment' . . . on the appropriate balance between a defendant's *rights* to adjudicatory procedures and the agency's interest in efficient prosecution."[28] The court stated that in using the terms "rules of agency organization, procedure or practice," Congress "intended to distinguish not between rules affecting different *classes of rights*--'substantive' and 'procedural'--but rather to distinguish between rules affecting different *subject matters*--'the rights or interests of regulated' parties, . . . and agencies' 'internal operations.'"[29]

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[26] 900 F.2d at 376.

[27] *Id.* (emphasis in original). The court cited as its authority for this rationale its earlier opinion in *National Motor Freight Traffic Ass'n v. United States, supra* n.16. The *ATA* court cited it for the proposition that a rule that affects the right to avail oneself of an administrative adjudication is not within the express terms of section 553(b)(A). However, *National Motor Freight* involved a situation where the agency created a reparations scheme without any statutory authorization. Moreover, the language quoted by the *ATA* case was not part of *National Motor Freight's* holding; it was simply an observation that a shipper's right to avail itself of the reparation proceeding was not trivial "simply because it is optional." 268 F.Supp. at 96.

In the *ATA* case, there was express statutory authority for administrative adjudication.

[28] 900 F.2d at 376 (emphasis in original).

[29] *Id.* at 378. The court also held that the FAA could not rely on the "good cause" exemption because (1) a statutory deadline does not automatically confer good cause, and (2) the agency's "own delay" in taking action undercut its invocation of that exemption. *Id.* at 379.

D. "Regulating primary conduct"

The dissent in the *ATA* case strongly disagreed with the appropriateness of eliminating the procedure/substance distinction. While recognizing its difficulty of application, the dissent noted that it was Congress that had established the distinction, and that Congress did not say that rules become less procedural simply because they are significant.

The dissent proposed the following distinction as consistent with the APA: "If a given regulation purports to direct, control, or condition the behavior of those institutions or individuals subject to regulation by the authorizing statute, it is not procedural, it is substantive."[30] Recognizing that agency rules must fall somewhere on a continuum from procedural to substantive, the dissent took the view that the FAA's rules of practice, "which deal with enforcement or adjudication of claims of violations of the substantive norm but do not *purport* to affect the substantive norm[,] . . . are . . . clearly procedural."[31]

IV. Developing a Workable Test

While there is general agreement on the need for a line between what is covered by the exemption and what is not, the cases discussed above demonstrate the difficulty in drawing such a line.

The "procedure is procedure" test is ultimately unhelpful in many cases because, as noted, substance can be masked as procedure. An agency's label cannot always be relied on, in this area as in others.[32] On the other hand, when a rule deals with the processes an agency uses or intends the public to use in its rulemaking or adjudications, these appear to have been generally (until the *ATA* case) considered procedural for the purposes of the APA exemption.

The "encodes a substantive value judgment" test is problematic at best. As it has been applied, courts have either not engaged in useful analysis, or they have used the test in a way that could effectively eliminate the statutory distinction between procedural and substantive rules. In *Reeder*, the test was applied without substantial discussion, although the result was probably correct because the assertedly procedural rule did modify the substantive regulatory program. In contrast, the D.C. Circuit in *ATA* applied the test by looking not at whether the procedural rule affected the substance of the behavior the agency is charged with enforcing in civil penalty proceedings (i.e., aviation safety),[33] but at the way the rule balanced interests in procedural due process. Under such an application, no agency rules of practice would likely qualify as exempt, because all procedures that in *any way* involve the public's interaction with an agency necessarily involve a balance between agency interests and those of the public.[34] Moreover, the *ATA* court's rejection of the procedure/substance dichotomy in favor of a "functional analysis" clearly undercuts the APA's statutory distinction between "rules of procedure" and "substantive rules."[35]

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[30] *Id.* at 382.

[31] *Id.* (emphasis in original).

[32] *See, e.g., General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1074 (1985); *Chamber of Commerce v. Occupational Safety and Health Administration*, 636 F.2d 464 (D.C. 1980).

The "substantial impact" test is similarly flawed. It focuses not on the nature of a rule's impact, but solely on its magnitude. Such a distinction ignores the Congressional intent to treat procedural rules differently from substantive rules. A rule does not become less procedural merely because it affects a large number of people. Moreover, the test ultimately provides little guidance, since the "substantiality" of a rule's impact can often only be judged in retrospect; this would require prudent agencies to put rules out for notice and comment even where such notice and comment should not be required.

The "primary conduct" test proposed by the *ATA* dissent seems to be as close to an appropriate test as currently exists. It looks at "primary conduct," namely, the type of activity that is subject to the agency's regulation. To the extent that an agency "procedural rule" meaningfully affects such behavior, it is--regardless of its label--"substantive" and therefore should be subject to notice-and-comment requirements. A similar test would apply in the context of government programs[36] (where regulation is often directed not at conduct or behavior, but at eligibility); if the procedure meaningfully affects the standards for eligibility, it would likewise cease to be "procedural" and become

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[33] It seems unlikely that the procedures that would apply in an adjudicatory hearing on penalties would have much impact on industry compliance with air safety regulations.

[34] *Cf. Mathews v. Eldridge*, 424 U.S. 319 (1976). As Judge Silberman's dissent in *ATA* put it, "[I]t will be impossible for any agency general counsel, in the future, safely to advise agency heads that a given set of proposed rules are procedural." 900 F.2d at 381.

[35] Although the term "substantive rule" does appear in section 553(d), the clearest distinction appears in the publication section (now section 552(a)(1)(C) and (D), formerly section 3(a) of the original APA). The Attorney General's Manual, *supra* n. 12, also makes great use of the term "substantive rules." *Id.* at 22.

[36] The term program as used here is intended to be interpreted broadly, to include, among other things, those involving benefits, grants, contracts, permits, licenses, and loan guarantees. Rules relating to grants and benefits are exempt from notice and comment, 5 USC §553(a)(2). However, the Conference has recommended eliminating this exemption, Recommendation 69-8, *supra* n.10, and many agencies have voluntarily waived their use of it. *E.g.*, 24 CFR §10.1 (DHUD) (1990); 29 CFR §2.7 (DOL) (1990).

"substantive."[37] This test creates a relatively bright line, and has the advantage of emphasizing whether the rule has a *substantive* effect rather than a *substantial* effect, thus placing the focus on the nature of the impact and retaining the distinction between procedure and substance.

It should also be remembered that the fact that a procedural rule may be issued without notice and comment does not preclude challenges to the rule's contents. The provisions of such a rule must be consistent with the applicable statute, APA requirements, and the due process clause of the Constitution. The rule must also not be arbitrary, capricious, or an abuse of discretion. Moreover, someone interested in putting their views before the agency on a procedural rule may at any point file a petition for rulemaking requesting a change in the rule.[38]

We therefore recommend the Conference to urge agencies (and reviewing courts) to employ the following standards when deciding whether rules are procedural and, thus, legally exempt from notice-and-comment requirements: a rule is within the procedural rule exemption and, thus, exempt from notice and comment only if (a) the rule relates to agency procedures (either internal operations or agency methods of interacting with the public), and (b) the rule does not meaningfully affect (i) conduct, activity, or a substantive interest that is the subject of agency regulation, or (ii) the standards for eligibility for government programs.[39]

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[37] *See Fugere v. Derwinski*, 119 DAILY WASH. L. REP. 289 (Feb. 11, 1991) (C.V.A. 1990)(Departmental veterans benefits manual provision affecting eligibility for disability held to be substantive); *Air Transport Ass'n v. DOT, supra* n.4, 900 F.2d at 382-83 (Silberman, J., dissenting). *Cf. Batterton v. Marshall*, 648 F.2d 694, 702-03, 707-08 (D.C. Cir. 1980). In some cases agencies, with court approval, have invoked the procedural rule exemption for enforcement manuals issued for the purposes of setting out the agency's policies in prosecuting enforcement actions. *See, e.g., American Hospital Ass'n v. Bowen, supra* n. 20; *Department of Labor v. Kast Metals Corp.*, 744 F.2d 1145 (5th Cir. 1984)(OSHA inspection targeting plan). While enforcement manuals can be analyzed as to whether they are or are not "procedural" as suggested by this memorandum, it is likely that the more salient claim would be that such manuals fall within the exemption for "interpretative rules [or] general statements of policy." *See, e.g., Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986)(Scalia, J.)(MSHA inspectors' guidelines held to be policy statement).

[38] See 5 USC §553(e). See also Recommendation 86-6, "Petitions for Rulemaking," 1 CFR §305.86-6 (1991); Luneberg, *Petitions for Rulemaking, Federal Agency Practice and Recommendations for Improvement*, 1986 ACUS RECOMMENDATIONS & REPORTS 493; *reprinted in revised form*, 1988 WIS. L. REV. 1 (1988).

[39] The Committee on Rulemaking has chosen to use the term "significantly" rather than "meaningfully." The authors prefer "meaningfully", which they believe focuses more on the qualitative rather than the quantitative aspects of the impact. However, "significantly" is an acceptable substitute. The authors recognize that the precise meaning of both words is difficult to articulate.

That this proposed recommendation would interpret the procedural rule exemption to take certain types of rules, such as rules governing conduct of formal adjudication or ex parte rules, outside the mandatory notice-and-comment requirements does not mean that agencies should not be encouraged to consider voluntarily using such procedures in their promulgation. The Conference is on record as generally favoring the use of notice and comment because of its recognized advantages;[40] among those are (1) providing the agency with valuable input from the public, including information about the impacts of the rule and other information the agency may not have at its disposal, and (2) providing enhanced legitimacy and public acceptance of rules that comes from having public participation in the process.

The Conference should therefore recommend that agencies voluntarily provide an opportunity for notice and comment with respect to certain types of procedural rules. When considering promulgating procedural rules, agencies should weigh the benefits of notice and comment against the costs. This proposal recognizes that there can be substantial costs associated with notice-and-comment rulemaking. Although the section 553 procedures are not onerous, there is a cost (of approximately $400 per page) for Federal Register publication. Notice-and-comment procedures also occupy additional time and energy of agency personnel. The benefits of notice and comment, however, can be substantial. Particularly where the rules at issue involve procedures to be used in administrative adjudication (formal or informal) of new programs or major modifications of existing procedures, providing notice and comment will offer the advantages mentioned above. Where minor or technical changes to rules of practice are involved, notice-and-comment rulemaking would not appear to be called for. The most difficult, of course, are those that are minor to some and more significant to others. Here, agencies should err on the side of openness, and provide an opportunity for advance comment unless the cost-benefit ratio becomes disproportionate. In fact, it appears that agencies generally do provide opportunity for notice and comment for rules of procedure or practice.[41]

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[40] *E.g.*, Recommendation 69-8, *supra* n.10.

[41] We have had the opportunity to review agency responses to an American Bar Association questionnaire on the extent to which agencies use notice-and-comment procedures in promulgating rules of procedure and practice. We have also reviewed comments from agency general counsels on the Committee's proposed recommendations. The responses indicate that most agencies do generally use notice and comment for such rules, although not for rules of agency organization. This may explain why there are relatively few cases addressing the applicability of the APA exemption.

The responses to the questionnaire indicate that agencies do, however, wish to retain their discretion to use the statutory exemption in appropriate situations.

Adding a proposal stage to the rulemaking could also have the potential of producing additional review by the Office of Management and Budget. Under Executive Order 12,291, which provides the authority and framework for OMB review of agency rulemaking, rules "describing the procedure or practice requirements of an agency" are not exempt from review.[42] The Executive Order provides for submission to and clearance by OMB of agency rules at both the proposed and final stages, and such review can be time consuming. It is possible that agencies may be discouraged from voluntarily using notice and comment because its use could produce additional delays at the review stage.

Because it generally would be counterproductive to discourage the use of notice-and-comment rulemaking in the case of procedural rules, the Conference should recommend that the Office of Management and Budget refrain from reviewing proposed rules fitting within the definition of rules of procedure or practice where an agency has voluntarily chosen to use the notice-and-comment process.

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[42] The Order does exempt from its coverage rules "related to agency organization, management, or personnel." OMB officials have acknowledged in conversations with the authors of this memorandum that the Executive Order, by its terms, covers procedural rules exempt from notice and comment, but they also stated that OMB generally refrains from exercising its review over rules that are solely procedural in scope.

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Report for Recommendation 92-2

Interpretive Rules, Policy Statements, Guidances, Manuals and the Like: Should Agencies Use Them to Bind the Public?

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

I. Introduction and Summary

With one exception, the answer to the question in the title is no. To use such nonlegislative documents to bind the public violates the Administrative Procedure Act and offends our system of limited government. This is true whether the agency attempts to bind the public as a legal matter or as a practical matter. An agency may not make binding law except in accordance with the authorities and procedures established by Congress. To make binding law through actions in the nature of rulemaking, the agency must use legislative rules, which ordinarily must be made in accordance with the notice-and-comment procedures specified by §553 of the APA.[1]

The sole category of exceptions--where an agency may permissibly attempt to make a substantive nonlegislative rulemaking document binding on private parties--is for interpretive rules.[2] These are rules that interpret statutory language which has some tangible meaning, rather than empty or vague language like "fair and equitable" or "in the public interest."[3] An agency may nonlegislatively announce or act upon an interpretation that it intends to enforce in a binding way, so long as it stays within the fair intendment of the statute and does not add substantive content of its own.[4] Because Congress has already acted legislatively, the agency need not exercise its own delegated legislative authority. Its attempts to enforce an interpretation can be viewed as simply implementing existing positive law previously laid down by Congress. As a practical matter, the agency in this way gives the interpretation a binding effect.[5] The same is true where the agency interprets its own previously-promulgated legislative rules.

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[1] 5 U.S.C. §553 (1988). *See* Chrysler Corp. v. Brown, 441 U.S. 281, 302-303 (1979). An agency may make law through adjudication, as contrasted with rulemaking, without complying with §553 procedures or otherwise observing the requirements for making legislative rules. *See* text at notes 32-35 and 40-47 *infra*. This Article is not concerned with the law made by adjudication. That the two styles of lawmaking are governed by widely different procedural requirements (strict for rules but loose for adjudications) is an anomaly created by Congress when it enacted §553 and confirmed by the Supreme Court in SEC v. Chenery Corp., 332 U.S. 194 (1947), NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969), and NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

[2] Legislative rules made pursuant to specific exemptions in §553, *see* text at notes 50-53 *infra*, do not supply additional exceptions to the statements in the text about *nonlegislative* documents. The exemptions in §553 relieve the agency of having to follow that section's notice-and-comment procedures, but they do not relieve the agency of the need, if its rule is to be binding, to satisfy other requirements of legislative rulemaking, *see* text at notes 40-44 *infra*. Even when its *legislative* rules would come within §553's exemption from notice-and-comment procedure, the agency may not use a *nonlegislative* document to bind the public, unless that document is an interpretive rule.

[3] *See* text at notes 55-67, *infra*.

[4] *See* American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1045-46 (D.C. Cir. 1987)(differentiating "cases in which an agency is merely explicating Congress' desires from those cases in which the agency is adding substantive content of its own," and speaking of a "classic example of an agency rule not held to be interpretive--and thus requiring notice-and-comment as a prerequisite to validity")(Wald, J.) and authorities therein cited. "The function of

By contrast, when it does not merely interpret but sets forth onto new substantive ground through rules that it will make binding, the agency must

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§553's first exception, that for 'interpretive rules,' is to allow agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings." *Id.* at 1045.

See also Fertilizer Institute v. EPA, 935 F.2d 1303, 1307-8 (D.C. Cir. 1991)("as a general rule, an agency can declare its understanding of what a statute requires without providing notice and comment, but an agency cannot go beyond the text of a statute and exercise its delegated powers without first providing adequate notice and comment")(Henderson, J.); United Technologies v. EPA, 821 F.2d 714, 719-720 (D.C. Cir. 1987)("these cases show that what distinguishes interpretative from legislative rules is the legal base upon which the rule rests. If the rule is based on specific statutory provisions, and its validity stands or falls on the correctness of the agency's interpretation of those provisions, it is an interpretative rule. If, however, the rule is based on an agency's power to exercise its judgement as to how best to implement a general statutory mandate, the rule is likely a legislative one")(McGowan, J.); American Postal Workers Union v. USPS, 707 F.2d 548, 559-560 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984)("As an interpretative rule, the new annuity computation formula is exempt from the rulemaking requirements of the APA, and OPM therefore did not act unlawfully in promulgating it without notice and comment proceedings")(Tamm, J.); Grey Panthers Advocacy Comm. v. Sullivan, 936 F.2d 1284, 1291-92 (D.C. Cir. 1991); Komjathy v. NTSB, 832 F.2d 1294, 1296-97 (D.C. Cir. 1991)(Henderson, J.). *See also* cases cited in note 359 *infra*.

It is cliché to observe that these distinctions are sometimes difficult to draw. That makes them none the less indispensable to the analysis needed to identify unauthorized attempts to fasten binding norms upon the public.

[5] By declaring that the given interpretation is the one it will apply, or by basing enforcement action upon it, or by routinely applying it to pass upon applications, the agency binds the affected private parties *as a practical matter*, *see* text at notes 78-88 and 359-361 *infra*, at least until a court disapproves the interpretation. The agency is treating the interpretation as dispositive of the question involved, and private parties can ignore it only at their peril. The private parties are thus bound *practically* even though the nonlegislatively-promulgated interpretation does not *legally* bind them: An agency interpretation does not bind the courts and does not of its own force bind the public unless it has been embodied in a legislative rule or other action carrying the force of law, since a court is free to arrive at a different interpretation. *See* note 359 *infra*; EEOC v. Arabian American Oil Co., 111 S.Ct. 1227, 1235-36 (1991); General Electric Co. v. Gilbert, 429 U.S. 125, 141 (1976); Morton v. Ruiz, 415 U.S. 199 (1974); Skidmore v. Swift & Co., 323 U.S. 134 (1944). *See* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. on Reg. 1, 3-4, n.6, 39 (1990).

observe the legislative processes laid down by Congress.[6] That is, *when an agency uses rules to set forth new policies that will bind the public, it must promulgate them in the form of legislative rules.* The statutory procedures for developing legislative rules serve values that have deep importance for the advancement of fair and effective administrative process and indeed for the maintenance of a democratic system of limited government.[7]

Except to the extent that they interpret specific statutory or regulatory language, then, *nonlegislative rules like policy statements, guidances, manuals and memoranda should not be used to bind the public.*[8] While these nonlegislative rules by definition cannot *legally* bind, agencies often inappropriately issue them with the intent or effect of imposing a *practical* binding norm upon the regulated or benefitted public. Such use of nonlegislative policy documents is the capital problem addressed by this Article.

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[6] Administrative Procedure Act §4, 5 U.S.C. §553 (1988); Chrysler Corp. v. Brown, 441 U.S. 281, 303 (1979); American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1044-46 (D.C. Cir. 1987). In addition to those of the Administrative Procedure Act ("APA"), other statutory requirements may specify the legislative rulemaking procedures in particular areas. *E.g.*, 20 U.S.C. 1232 (1988)(Dep't of Education); 15 U.S.C. §57a (1988)(Federal Trade Comm'n).

The APA §553 procedures, often called "notice-and-comment" procedures, call for publication of notice of the proposed rulemaking (including notice of any public proceedings, of the legal authority under which the rules are proposed, and of the terms of the proposal or the subjects and issues involved); opportunity for all interested persons to comment through submission of written views, with or without opportunity for oral presentation; consideration of the matter presented; and publication of the rules, including a concise statement of their basis and purpose, in the Federal Register (as specified in 5 U.S.C. §552(a)(1) (1988).

Section 553 provides exemptions from these requirements for "interpretative rules, general statements of policy, [and] rules of agency organization, procedure, or practice;" 5 U.S.C. §553(b)(A) (1988), and when the agency "for good cause" finds "that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. §553(b)(B) (1988). The exemptions for interpretive rules and policy statements are central topics of this Article.

In their adjudicatory opinions, agencies often announce the propositions of law or policy that formed the basis of their decisions. These propositions are not treated as rules by the APA, and are not governed by the statement in the text. *See* text at notes 30-35 *infra*. Nor are nonsubstantive rules of agency organization, procedure, or practice governed by the statement in the text. *See* text at notes 52-53 *infra*.

[7] *See* text at notes 349-351 *infra*.

[8] All documents and actions like these are "rules" within the APA definition, 5 U.S.C §551(4) (1988), and also are "policy statements" within the APA's taxonomy, as explicated below. Text at notes 64-69 *infra*.

"'[R]ule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency * * *" 5 U.S.C. §551(4)(1988). The definition thus includes documents and actions that do not have the force of law (nonlegislative rules) as well as those that do (legislative rules). The "agency process for formulating, amending, or repealing a rule" is defined as "rule making" by the APA, 5 U.S.C. §551(5)(1988).

Thus, under the taxonomy of the APA,[9] a rulemaking action that the agency wishes to make binding upon affected persons must be either a legislative rule (which binds legally) or an interpretive rule (which may bind practically). All other substantive rulemaking documents--such as policy statements, guidances, manuals, circulars, memoranda, bulletins and the like--are in APA terminology "policy statements",[10] which the agency may *not* make binding, either as a legal matter or as a practical matter. These issuances will sometimes be referred to as "nonlegislative policy documents" or "policy documents."

This Article accordingly will advance the general recommendation, based on the APA, that agencies observe legislative rulemaking procedures for any action in the nature of rulemaking that is intended to impose mandatory obligations or standards upon private parties, or that has that effect. To the extent that agency pronouncements interpret specific statutory or regulatory language, this general recommendation does not apply. But the Article will separately recommend that interpretations which substantially enlarge the jurisdiction exercised by the agency, or substantially change the obligations or entitlements of private parties, should nevertheless be promulgated by legislative rulemaking procedures as a matter of sound agency practice.[11]

The use of legislative rulemaking procedures is not the only cure to be prescribed for the misuse of nonlegislative documents described herein. An agency has the option of issuing its policies in the form of policy statements that are genuinely nonbinding. When it chooses to do so, the agency should observe an alternate process, by which it can assure that its documents are not binding and therefore will not be invalidated on the ground that they were not promulgated by the use of legislative rulemaking procedures.[12] To achieve these outcomes, the agency should stand ready to entertain challenges to the policy in particular proceedings to which the document may apply, and should observe a disciplined system for maintaining an "open mind" when passing upon such challenges.[13]

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[9] *See* Section II *infra*.

[10] *See* note 8 *supra* and text at notes 64-69 *infra*.

[11] *See* text at notes 363-366 *infra*.

The implementation of these recommendations will doubtless in some circumstances prove inconvenient or costly to the agency. *See* discussion in text at notes 373-374 *infra*. In especially difficult circumstances the agency may rely upon the exemption from rulemaking requirements that applies "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. §553(b)(B) (1988). Also available is the exception from publication requirements "as otherwise provided by the agency for good cause found and published with the rule." 5 U.S.C. §553(d)(3) (1988). These "good cause" exceptions supply an adequate safety valve, and unless the agency can invoke them it should follow the recommendations herein. *See* Arthur Earl Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540, 588-608 (1970).

Finally, the Article recommends procedures through which an agency, whenever it intends a rule to be a legislative rule, should announce that intention and inform the public about the statutory authorities and procedures by which it has acted.

Although the subject is complex and evidence is laborious to assemble, it is manifest that nonobservance of APA rulemaking requirements is widespread. Several agencies rely in major part upon nonlegislative issuances to propagate new and changed elements in their regulatory or benefit programs.[14] This Article examines a number of agency attempts to make nonlegislative policy documents bind the public.[15] Frequently such rules are not challenged in court, because the affected private parties cannot afford the cost or the delay of litigation, or because for other practical reasons they must accept a needed agency approval or benefit on whatever terms the agency sets.[16]

The use of nonlegislative policy documents generally serves the important function of informing staff and the public about agency positions, and in the great majority of instances is proper and indeed very valuable. But the misuse of such documents--to bind, where legislative rules should have been used--carries great costs. Affected members of the public are likely to be confused or misled about the legal quality of the standards the agency has imposed. One consequence of this uncertainty can be that affected persons are unaware that the agency intends to give its nonlegislative issuance binding effect. Probably more often, though, the private parties realize all too clearly that the agency will insist upon strict compliance, but conclude that there is little they can do to resist. In either case, the uncertainty can breed costly waste of effort among private parties trying to puzzle out how far they are bound or otherwise affected by the informal agency document.[17]

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[12] *See* Section VI *infra.*

[13] *See* text at notes 352 - 356 *infra*. *See also* McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1325 (D.C. Cir. 1988)("an agency's open-mindedness in individual proceedings can substitute for a general rulemaking")(per S. Williams, J.); Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 39 (D.C. Cir. 1974)("When the agency states that in subsequent proceedings it will thoroughly consider not only the policy's applicability to the facts of a given case but also the underlying validity of the policy itself, then the agency intends to treat the order as a general statement of policy")(per MacKinnon, J.).

[14] Examples are the Health Care Financing Administration with respect to Medicare and Medicaid, the Department of Education with respect to guaranteed student loans, the Federal Energy Regulatory Commission with respect to regulation of pipelines and the Nuclear Regulatory Commission with respect to reactor safety.

[15] Sections IV and VI, *infra.*

[16] In at least one case, Congress has expressly precluded judicial review of failure to observe APA §553's rulemaking requirements. 42 U.S.C.§1395ff(b)(3)(B)(1988)(national coverage Medicare determinations by Health and Human Services). *But see* Administrative Conference of the United States Recommendation 87-8, *National Coverage Determinations Under the Medicare Program,* para. 4(b), 1 CFR §305.87-8(4)(b)(1991)(recommending that Congress consider repealing §1395ff(b)(3)(B)).

Doubtless more costly yet is the tendency to overregulate that is nurtured when the practice of making binding law by guidances, manuals and memoranda is tolerated. If such nonlegislative actions can visit upon the public the same practical effects as legislative actions do, but are far easier to accomplish, agency heads (or, more frequently, subordinate officials) will be enticed into using them. Where an agency can nonlegislatively impose standards and obligations that as a practical matter are mandatory, its work is greatly eased, in several ways. It escapes the delay and the challenge of allowing public participation in the development of its rule.[18] It probably escapes the toil and the discipline of building a strong rulemaking record.[19] It escapes the the discipline of preparing a statement of the basis and purpose justifying the rule.[20] It may also escape APA publication requirements[21] and Office of Management and Budget regulatory review.[22] And if the agency can show that its informal document is not final or ripe, it will escape immediate judicial review[23]. For practical reasons it may escape judicial review altogether.[24]

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[17] In some instances, agencies misstate the nature of their rules. *See, e.g.*, Cerro Metal Products v. Marshall, 620 F.2d 964, 975-78, 981 (D.C. Cir. 1980); Chamber of Commerce of the United States v. OSHA, 636 F.2d 464(D.C. Cir. 1980).

[18] *See* 5 U.S.C. §553(c)(1988).

[19] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 42-43 (1983).

[20] *See* 5 U.S.C. §553(c)(1988); Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42-43, 57 (1983).

[21] 5 U.S.C. §§552(a)(1)(D), 553(b),(c) (1988). The requirement to publish in the FEDERAL REGISTER "statements of general policy or interpretations of general applicability formulated and adopted by the agency", 5 U.S.C. §552(a)(1)(D)(1988), is honored far more frequently in the breach than in the observance.

[22] *See* Exec. Order No. 12,291 (1981). *But see* Memorandum of the Vice President to Heads of Executive Departments and Agencies on the Regulatory Review Process, March 22, 1991, at p. 1: "The Administration has consistently interpreted the Executive Order [12,291] to include all policy guidance that affects the public. Such policy guidance includes not only regulations that are published for notice and comment, but also strategy statements, guidelines, policy manuals, grant and loan procedures, Advance Notices of Proposed Rule Making, press

One can readily understand how a governmental instrument so quick, cheap, largely unchecked and low in risk, and yet so effectual, may tempt some agencies to slight the APA's mandates.

A particularly perverse phenomenon arises from some courts' emphasis upon the discretion retained by the agency as an indicator of the nonbinding character of its issuance.[25] Under this approach, the more discretion the agency reserves in a document, the better are its chances that a court will hold that legislative rulemaking procedures were not required, even though the public was plainly meant to be bound.[26] The theory is that the agency, by reserving discretion, has not bound itself. The incentives work the wrong way here. The prospect of avoiding legislative procedures encourages the agency to be cagey rather than candid, and to state its rules loosely rather than precisely. A preferable test would consider whether the constraints on private persons amount to binding *them*. Otherwise, it is perfectly easy for a document to reserve plenty of discretion for the agency to act variantly, even where it makes clear that private parties will be held to a strict conformity.[27] Any tactical advantage the agency gains comes at the expense of clarity and fairness to affected private persons.

To countenance nonlegislative documents that bind is inevitably to expand the agency's discretion in a most undesirable way. Though the public is bound the agency is not bound, as it would be if it had used legislative rules.[28] It is easier for the agency to deviate from or change positions taken in policy

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releases and other documents announcing or implementing regulatory policy that affects the public."

[23] *See* Richard J. Pierce, Jr., Sidney A. Shapiro and Paul R. Verkuil, ADMINISTRATIVE LAW AND PROCESS 180-206 (1985).

[24] *See* Nat'l Solid Waste Management Ass'n v. EPA, 1987 U.S. App. LEXIS 17745, 27 E.R.C. (BNA) 1566 (D.C. Cir. 1987).

[25] *See* Section VI, *infra*.

[26] *See* text at notes 298-301 *infra*.

[27] Consider, for example, the new 1991 EPA disclaimer form, in text at note 300 *infra*.

[28] *See* Service v. Dulles, 354 U.S. 363, 372 (1957) ("regulations validly prescribed by a government adminstrator are binding upon him as well as the citizen"); Boske v. Comingore, 177 U.S. 459, 467-70 (1900). *See also* United States v. One 1985 Mercedes, 917 F.2d 415, 423 (9th Cir. 1990)("To prevail on his claim that the agency impermissibly departed from its own policy in seizing his property, Glenn must establish that the policy in question had the force and effect of law"); Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 536-37 (D.C. Cir. 1986)(an agency "need not adhere to mere 'general statement[s] of policy'"); Doe v. Hampton, 566 F.2d 265,278-82 (D.C. Cir. 1977).

statements, memoranda and the like than it is to deviate from or change those adopted through legislative processes.[29] It may be observed generally that nonlegislative documents often are less clear and definite than legislative rules, and may enable the agency to operate at a lower level of visibility, with greater discretion and with fewer checks from the public and the courts.

Observance of legislative rulemaking requirements may appear burdensome to some agencies. One can realistically confront and assess the practical difficulties, however, only after pursuing the greatest possible clarity about the concepts and the requirements that these things entail. That pursuit must be the first objective of this Article.

II. A Short Taxonomical Guide to Agency Rulemaking

To subdue this problem, strong analytical tools are needed. The courts lamentably have muddled critical concepts as to which clarity and precision are essential for solution of the problem at hand. (1) We must be able to distinguish legislative from nonlegislative rules. (2) We must be able to distinguish policy statements from interpretive rules. (3) We must be able to identify the circumstances in which agencies should use legislatively promulgated rules instead of interpretive rules or policy statements.

All of these distinctions arise under section 553 of the Administrative Procedure Act, whose taxonomy I shall now briefly describe. This description will supply the means to draw the first two of the distinctions just cited. The third is the chief subject of this study, and will be treated at greater length.

A. Rules and Rulemaking

This Article is concerned only with agency actions that fall within the Administrative Procedure Act's definition of "rule" by constituting "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure or practice requirements of an agency * * * ."[30] Issuances embraced within this definition come in a myriad of formats and bear a myriad of labels: legislative rules, interpretive rules, opinion letters, policy statements, policies, program policy letters, Dear Colleague letters, regulatory guidance letters, rule interpretations, guidances, guidelines, staff instructions, manuals, questions-and-answers, bulletins, advisory circulars, models, enforcement policies, action levels, press releases, testimony before Congress, and many others.[31]

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[29] It is not clear whether the judicially-established requirement of a reasoned explanation for a change in policy, *see* Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Ins. Co., 463 U.S. 29, 57 (1983), applies to nonlegislative documents as well as to legislative rules or policies adopted in formal adjudications. *Compare* United States v. One 1985 Mercedes 917 F.2d 415, 423 (9th Cir. 1990) and Brock v. Cathedral Bluffs Oil Co., 796 F.2d 533, 536-37 (D.C. Cir. 1986) *with* Delaney v. EPA, 898 F.2d 687, 693 (9th Cir. 1990)("The EPA must adhere to its own guidelines") and Telecommunications Research and Action Center v. FCC, 800 F.2d 1181, 1184 (D.C. Cir. 1986). As a practical matter, since nonlegislative documents are not easily challenged because they may be deemed unripe or not final, judicial discipline over policy changes is minimized. *See* Middle South Energy, Inc. v. FERC, 747 F.2d 763, 772 (D.C. Cir. 1984).

The agency process for formulating, amending or repealing any such "rule" is defined as "rulemaking" by the APA.[32] Final agency dispositions in matters that are not rulemakings are "adjudications,"[33] which typically determine the entitlements, liabilities or status of individually named or identifiable parties. Agencies are entitled, without observing the statutory rulemaking procedure, to set forth in their adjudicatory opinions the general propositions of law or policy that formed the basis for the adjudicatory decisions.[34] Though such statements may create new agency law, they are not "rules," and are not addressed in this Article.[35]

B. Legislative and Nonlegislative Rules

Rules are broadly classified as "legislative" and "nonlegislative."[36] This classification is vital for the present analysis. The United States Court of

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[30] 5 U.S.C. §551(4)(1988).

[31] *See* National Automatic Laundry and Cleaning Council v. Shultz, 443 F.2d 689 (D.C. Cir. 1971).

[32] 5 U.S.C. §551(5)(1988).

[33] 5 U.S.C. §551(6),(7)(1988).

[34] NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); SEC v. Chenery Corp., 332 U.S. 194 (1947).

[35] The author has previously addressed the problems of fairness and effectiveness that agencies engender when they rely for making their law upon a process of case-by-case adjudication instead of rulemaking. Robert A. Anthony, *Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings*, 24 STAN. L. REV. 1, 51-55 (1971). *See also* note 265, *infra*. But nothing in the present Report is intended to suggest that it is improper for an agency to lay down, as the basis of its adjudicatory decisions, general principles to which it expects the public to conform.

[36] The courts, unfortunately, sometimes confusingly use the term "substantive rule" to mean "legislative rule." *Compare, e.g.*, United Technologies Corp. v. EPA, 821 F.2d 714, 719 (D.C. Cir. 1987)("distinguish[ ] interpretive from legislative rules") *and* American Hospital Ass'n v.

Appeals for the District of Columbia Circuit has stated: "The distinction between legislative rules and interpretative rules or policy statements [*i.e.*, the two categories of nonlegislative rules] has been described at various times as 'tenuous,' 'fuzzy,' 'blurred,' and, perhaps most picturesquely, 'enshrouded in considerable smog.' As Professor Davis puts it, 'the problem is baffling.'"[37]

With respect, the distinction is very clear.[38] Legislative rules *can* readily be differentiated from those that are nonlegislative. The fundamental idea is that a "legislative rule is the product of delegated legislative power to make law through rules."[39]

Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987)("whether a given agency action is interpretive or legislative") *with Id.* at 1045 ("the spectrum between a clearly interpretive rule and a clearly substantive one is a hazy continuum") *and* Cabais v. Egger, 690 F.2d 234, 237 (D.C. Cir. 1982)("distinguishing between substantive and interpretative rules"). *See also* Batterton v. Marshall,648 F.2d 694, 701 (D.C. Cir. 1980)(equating "'legislative' or 'substantive' rule"); Chrysler Corp v. Brown, 441 U.S. 281, 302-303 (1979).

As used in this Article, the term "substantive rule" contrasts with "procedural rule," and has a meaning parallel to the concept of "substantive law"--that is, a rule that creates or affects private rights, duties or obligations. *See* BLACK'S LAW DICTIONARY 1281 (5th ed. 1979). This is correct usage under the APA. *See* 5 U.S.C. §553(d)(1988). The term "substantive rule," therefore, embraces legislative rules, interpretive rules and policy statements other than those concerned with procedure, practice or agency organization. *See* 5 U.S.C. §§553(b)(A), 553(d)(1988); Joseph v. Civil Service Commission, 554 F.2d 1140, 1153 n. 24 (D.C. Cir. 1977)("Interpretative rules may be substantive in the sense of addressing a substantive rather than a procedural issue of law").

This Article also follows the widespread modern usage of substituting the word "interpretive" for the statutory term "interpretative." *See*_5 U.S.C. §553(b)(A), (d) (1988). For brevity, the term "policy statements" is used in place of the statute's "general statements of policy." *Id.*

[37] Community Nutrition Institute v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987)(citations omitted).

[38] Professor Koch had it right when, speaking of the distinction between interpretive rules and legislative rules, he wrote: "The distinction is not 'fuzzy' but clear; a legislative rule must be promulgated pursuant to a legislative grant of authority. The distinction is troublesome not because it is unclear, but because it is not always easy to determine * * * ." Charles H. Koch, Jr., *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy*, 64 GEO. L.J. 1047, 1049 n. 11 (1976). *See* text at notes 105 - 110, *infra*.

Despite their language, the courts just quoted and the authorities they cited were *not* addressing the distinction between legislative and nonlegislative rules (interpretive rules and policy statements). Rather, they were grappling with the question of whether a rule that *plainly was nonlegislative* should be invalidated or remanded because the agency should have promulgated it through legislative rulemaking procedures--that is, whether it *should have been a legislative rule*. That inquiry is a central focus of the present study.

[39] 2 Kenneth Culp Davis, Administrative Law Treatise 36 (2d ed. 1979). *See also* Joseph v. Civil Service Commission, 554 F.2d a1140, 1153 n. 24 (D.C. Cir. 1977):

More particularly, a rule qualifies as legislative if all of the following requirements are met: (1) The agency must possess delegated statutory authority to act with respect to the subject matter of the rule.[40] (2) Promulgation of the rule must be an intentional exercise of that delegated authority.[41] (3) The agency must also possess delegated statutory authority to make rules with the force of law.[42] (4) Promulgation of the rule must be an intentional exercise of the authority to make rules with the force of law.[43] (5) Promulgation of the rule must be an effective exercise of that authority.[44] (6) The promulgation must observe procedures mandated by the agency's organic statute and by the Administrative Procedure Act.[45] Particularly, unless it falls within an exemption in the organic legislation or in the APA, the rule must be

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The relevant distinction between legislative and interpretative or any other nonlegislative rules is not the nature of the questions they address but the authority and intent with which they are issued and the resulting effect on the power of a court to depart from the decision embodied in the rule. *See* Koch, *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy*, 64 GEO. L.J. 1047, 1047-49 & nn. 4-9 (1976).

[40] Chrysler Corp. v. Brown, 441 U.S. 281, 302-303 (1979). In the case of interpretation of a statute that the agency has the primary responsibility to administer, such a delegation as to subject matter may be implied from the silence or ambiguity of the statute on the points in question. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-44 (1984); *see* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?* 7 YALE J. ON REG. 1, 31-35 (1990). One may speculate that the Supreme Court, when a proper case is presented to it, is likely to establish a similar presumption for rules that do not involve interpretations.

[41] *See* 2 Kenneth Culp Davis, Administrative Law Treatise 50-57 (2d ed. 1979).

[42] Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979); Batterton v. Marshall, 648 F.2d 694, 701 (D.C. Cir. 1980). A general statutory grant of rulemaking power will ordinarily be sufficient to authorize the agency to issue rules having legislative force. *See, e.g.*, National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688 (2nd Cir. 1975), *cert. den.* 423 U.S. 827 (1975).

[43] The agency may possess such authority, but intend to produce only a policy statement, which of course is not legislative. *See* Batterton v. Marshall, 648 F.2d 694, 702 (D.C. Cir. 1980); Kenneth Culp Davis, 2 Administrative Law Treatise, 50-57 (1979).

[44] The issuance cannot be a legislative one if it is set forth in some format as to which the agency lacks statutory authority to act with the force of law. *See* Anthony, note 5 *supra*, 7 YALE J. ON REG. at 36-40. Also, if the agency retains a great deal of discretion to act at variance with the statement it has issued, the issuance might not represent an effective exercise of the rulemaking authority. *See* Guardian Federal Savings & Loan v. Federal Savings & Loan Ins. Corp., 589 F.2d 658, 667-68 (D.C. Cir. 1978). However, if the agency intends that private parties are to be bound, the fact that discretion is retained should not relieve the agency from observing the procedural and other requirements for promulgation of a legislative rule. *See* Section VI, *infra*.

[45] Chrysler Corp. v. Brown, 441 U.S. 281, 302-303, 315 (1979).

developed through public notice-and-comment procedures[46] and be published in the *Federal Register*.[47] For purposes of this Article, the most important of the requirements is the sixth.

An agency's issuance is a valid legislative rule if and only if it meets all six of these requirements. *All substantive rules that do not fit this template are nonlegislative. They are either interpretive rules (if they interpret specific statutory or regulatory language) or policy statements (if they do not).*

The Administrative Procedure Act requires the use of legislative rulemaking procedures for every rule unless the rule falls within one of the statutory exceptions.[48] The courts have repeatedly declared that the exceptions are to be narrowly construed and reluctantly recognized, so as not to defeat the salutary purposes behind the notice-and-comment provisions of section 553.[49] For present purposes we must lay to one side the exceptions pertaining to the subject matter of rules[50] and to the existence of good cause to dispense with the statutory procedures.[51] These exceptions do not relate to the rules' legal quality. And the exception for rules of agency organization, procedure or practice is also set to the side. It bears only peripherally on the present study,[52] which is concerned with agency control or guidance of private conduct--that is, with substantive rather than procedural rules.[53] The exceptions that are of concern here are those for interpretive rules and policy statements.[54]

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[46] 5 U.S.C. §553 (1988).

[47] 5 U.S.C. §§552(a), 553(d) (1988).

[48] 5 U.S.C. §553 (1988). *See, e.g.*, W.C. v. Bowen, 807 F.2d 1502, 1504 (9th Cir. 1987); Thomas v. New York, 802 F.2d 1443, 1446-47 (D.C. Cir. 1986); Batterton v. Marshall, 648 F.2d 694, 700-01, 710 (D.C. Cir. 1980); Texaco v. FPC, 412 F.2d 740, 742-43, 745 (3rd Cir. 1969).

[49] *See* United States v. Picciotto, 875 F.2d 345, 347 (D.C. Cir. 1989); American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1044-45 (D.C. Cir. 1987) and cases there cited. On the benefits and costs of notice-and-comment procedures, *see* Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 402-404.

[50] 5 U.S.C. §553(a)(1)(involving military or foreign affairs functions); 5 U.S.C. §553(a)(2)(involving agency management, personnel, public property, loans, grants, benefits, or contracts).

[51] 5 U.S.C. §553(b)(3)(B).

[52] The question of when legislative rulemaking should be used for rules that arguably are procedural was presented in Air Transport Ass'n v. Dep't of Transportation, 900 F.2d 369 (D.C.Cir. 1990), *cert. granted*, No. 90-605, 59 U.S.L.W. 3451 (Jan. 18, 1991), *judgment vacated*, 59 U.S.L.W. 3547 (Feb. 19. 1991), and is the subject of a pending Adminstrative Conference study.

[53] *See* note 36, *supra*.

[54] 5 U.S.C. §553 (b)(A)(1988).

C. Interpretive Rules and Policy Statements

Our focus, then, is upon substantive rules, which under the APA may be (1) legislative rules, (2) interpretive rules, or (3) policy statements.[55] This is the entire universe of substantive rules.

At this point, it is useful to envision a simple grid. Norms that interpret can be issued either legislatively or nonlegislatively. Norms that do not interpret can also be issued either legislatively or nonlegislatively. All issued legislatively under the tests stated above[56] are legislative rules, whether they interpret or not. Those that are not legislative are either interpretive rules or policy statements, depending upon whether they interpret or not.

Because they are both nonlegislative, interpretive rules and policy statements are often usefully discussed together,[57] as in the subheading just above. But they are critically different for present purposes. The critical difference is that the courts treat interpretations as not making new law, on the theory that they merely restate or explain the preexisting legislative acts and intentions of Congress.[58] By contrast policy statements, although within the agency's authority, do not rest upon existing positive legislation that has tangible meaning.[59] Neither Congress nor the agency, acting legislatively, has already made the law that the policy statements express. Thus these documents are looked upon as creating new policy, albeit not legally binding policy since the documents were not promulgated legislatively.[60]

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[55] *See* note 36 *supra*. The label placed upon the rule by the agency, "while relevant, is not dispositive." General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984).

[56] *See* text at notes 38-47, *supra*.

[57] *E.g.*, Batterton v. Marshall, 648 F.2d 694, 702 (D.C. Cir. 1980); Peter L. Strauss, An Introduction to Administrative Justice in the United States 157-58 (1989); Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements,* 75 MICH. L. REV. 521 (1977); Charles H. Koch, Jr., *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy,* 64 GEO. L.J. 1047, 1050-53 (1976).

[58] American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987)("agency is merely explicating Congress' desires"); General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984); Citizens to Save Spencer County v. EPA, 600 F.2d 844, 876 (D.C. Cir. 1978); Pesikoff v. Sec'y of Labor, 501 F.2d 757, 763 n.12 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1030 (1974); American President Lines, Ltd. v. FMC, 316 F.2d 419, 421-22 (D.C. Cir. 1963); Gibson Wine Co. v. Snyder, 194 F.2d 329, 331 (D.C. Cir. 1952);

[59] *See* United Technologies v. EPA, 821 F.2d 714, 719-720 (D.C. Cir. 1987).

[60] "A binding policy is an oxymoron." Vietnam Veterans v. Secretary of the Navy, 843 F.2d 528, 537 (D.C. Cir. 1988). *See* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?* 7 YALE J. on Reg. 1, 2-6, 55-58 (1990).

An interpretive rule is an agency statement that was not issued legislatively and that interprets language of a statute[61] (or of an existing legislative rule)[62] which has some tangible meaning.[63]

A policy statement is an agency statement of substantive law or policy, of general or particular applicability and future effect,[64] that was not issued legislatively and is not an interpretive rule.[65]

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[61] "An interpretative rule is one which does not have the full force and effect of a substantive [legislative] rule but which is in the form of an explanation of particular terms in an Act." Gibson Wine Co. v. Snyder, 194 F.2d 329 (D.C. Cir. 1952), *quoted in* American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987); *in* Batterton v. Marshall, 648 F.2d 694, 705 (D.C. Cir. 1980) and in numerous other cases. "If the rule is based on specific statutory provisions, and its validity stands or falls on the correctness of the agency's interpretation of those provisions, it is an interpretative rule." United Technologies Corp. v. EPA, 821 F.2d 714, 719-720 (D.C. Cir. 1987).

A rule that purported to interpret a vacuous statutory term like "just and reasonable" or "public interest, convenience and necessity" would not be interpretive; if it were issued by legislative rulemaking it would be a legislative rule, but if not, such a rule would be a policy statement. *See* notes 66-68 and accompanying text, *infra*. *But see* Friedrich v. Sec'y of HHS, 894 F.2d 829, 837 (6th Cir. 1990)(articulation of what is "reasonable and necessary" in particular circumstances held to be interpretive).

[62] *E.g.*, Indiana Dep't of Public Welfare v. Sullivan, 934 F.2d 853 (7th Cir. 1991); Nason v. Kennebec County CETA, 646 F.2d 10, 16-18 (1st Cir. 1981); Nat'l Ass'n of Insurance Agents, Inc. v. Bd. of Governors, FRS, 489 F.2d 1268, 1270 (D.C. Cir. 1974).

[63] A rule that interprets statutory or regulatory language having specific meaning can be either legislative or interpretive. The fact that it interprets a statute does not reduce a legislative rule to the status of an interpretive rule. A classic case of statutory interpretation by means of a legislative rule is Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). I would hazard the guess that a majority of legislative rules involve interpretation of statutes.

Loose language in many of the cases, however, can be misunderstood to suggest that any rule announcing an interpretation must always be a mere nonlegislative rule, even if the rule had been promulgated legislatively. *E.g.*, Gibson Wine Co. v. Snyder, 194 F.2d 329-331 (D.C. Cir. 1952)("interpretive rules are statements as to what the administrative officer thinks the statute or regulation means"), *quoted in* American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987). The original culprit in this respect may have been the "working definition" offered by the Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947): "*Interpretative Rules*--rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."

[64] *See* the APA definition of "rule" in the text at note 30, *supra*.

[65] It is said that policy statements are "designed to inform rather than to control." American Trucking Ass'ns, Inc. v. ICC, 659 F.2d 452, 462 (5th Cir. 1981). And while policy statements often "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power," Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947), and perhaps always *should* do so, it is obvious that the category cannot be confined to statements of these sorts. For example, a nonlegislative document declaring a policy that

If the document goes beyond a fair interpretation of existing legislation,[66] it is not an interpretive rule.[67] Because it was not promulgated legislatively, it cannot be a legislative rule; it therefore is a policy statement. This is not merely the logical classification but is the proper one, since the agency is making policy in an area not specifically governed by the existing law.[68]

All substantive nonlegislative issuances that are not interpretive rules are policy statements--whether they are captioned or issued as policy statements or manuals or guidances or memoranda or circulars or press releases or even as interpretations.

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purports to control private parties' conduct is a policy statement. Whether it *should* have been issued as a legislative rule instead of as a policy statement is a separate question. A document's classification as a policy statement does not ipso facto qualify it for the policy statement exemption from §553's legislative rulemaking requirements. To be exempt, the statement must be tentative and not intended to be binding. *See* McLouth Steel Products Corp v. Thomas, 838 F.2d 1317, 1320-1321, 1323 (D.C. Cir. 1988); Community Nutrition Institute v. Young, 818 F.2d 943, 945-947, 949 (D.C. Cir. 1987); Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 37-39 (D.C. Cir. 1974).

On the distinctions between interpretive rules and policy statements, and betweeen those forms of nonlegislative rules and legislative rules, *see generally* Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 383-401; 1 Charles H. Koch, Jr., Administrative Law and Practice §§3.23-3.26 (1985); Arthur Earl Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy under the A.P.A.*, 23 ADMIN L. REV. 101, 108-117 (1971).

[66] *See* text at notes 3-5, *supra*. In a leading case, Judge Wald summarized the D. C. Circuit cases as having "generally sought to distinguish cases in which an agency is merely explicating Congress' desires from those cases in which the agency is adding substantive content of its own." American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

[67] *See* Cabais v. Egger, 690 F.2d, 234, 239 (D.C. Cir. 1982)("These rules...impose an obligation on the States not found in the statute itself. It cannot reasonably be argued that these rules are merely interpretative.") United Technologies Corp. v. USEPA, 821 F.2d 714, 719 (D.C. Cir. 1987)("rules in which the agency sought to fill gaps and inconsistencies left by the statutory scheme * * * picked up where the statute left off; 'by no stretch of the imagination could [they] have been derived by mere "interpretation" of the instructions of Congress'")(quoting Citizens to Save Spencer County v. EPA, 600 F.2d 844, 879 (D.C. Cir. 1979)). *See also* First Bancorporation v. Bd. of Governors, FRS, 728 F.2d 434, 438 (10th Cir. 1984).

[68] Consider, *e.g.*, the documents involved in Citizens to Save Spencer County v. EPA, 600 F.2d 844, 878-879 (D.C. Cir. 1979)("founded on no explicit provisions passed by Congress"); Chamber of Commerce of the U.S. v. OSHA, 468-69 (D.C. Cir. 1980)(nonlegislatively-issued "regulation does not merely *explain* the statute")(emphasis in original); Cabais v. Egger, 690 F.2d 234, 239 (D.C. Cir. 1982)("impose an obligation on the states not found in the statute itself"); Jerri's Ceramic Arts v. CPSC, 874 F.2d 205, 207-208 (4th Cir. 1989)("more is involved than mere 'interpretation'").

The cases are replete with statements to the effect that policy statements are "designed to inform rather than to control."[69] But many policy statements--and manuals, guidances memoranda and the like that fall within the category of policy statements--manifestly are "designed to control." These are the principal concern of this Article.

I have said that a substantive nonlegislative rule must be either an interpretive rule or a policy statement. Rather surprisingly, this perhaps self-evident proposition has eluded most courts and commentators, at least in the terminology they have chosen.

Though a document was plainly nonlegislative (because it was not promulgated by notice-and-comment procedures), courts nevertheless have regularly asked whether the document "is" a legislative rule[70] rather than a policy statement[71] or an interpretive rule.[72] This method of framing the issue begs the real question and seems to me to have bred unending confusion. For precision's sake, we must insist that these documents cannot "be" legislative rules, since they were not issued legislatively. What the court plainly was looking for in these cases was whether the agency was *trying* to issue a rule that was legislative in nature. Did it, for example, attempt to "implement a general statutory mandate"[73] or "intend[] to create new law, rights or duties"[74] or "impose an obligation * * * not found in the statute itself"[75] or "attempt * * * to supplement the Act, not simply to construe it"[76] or "conclusively determine[] the * * * trigger [for] the * * * program allocations"[77]? In other words, did the agency's nonlegislative action bind or attempt to bind the affected public?

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[69] American Trucking Ass'ns, Inc. v. ICC, 659 F.2d 452, 462 (5th Cir. 1981).

[70] Sometimes called a "substantive rule," *see* note 36 *supra*.

[71] *E.g.*, Community Nutrition Institute v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987) and cases there cited; McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1320-1322 (D.C. Cir. 1988); Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 37-38 (D.C. Cir. 1974).

[72] *E.g.*, Fertilizer Institute v. EPA, 935 F.2d 1303. 1307-8 (D.C. Cir. 1991) quoting General Motors v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1074 (1985); American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1045-1046 (D.C. Cir. 1987); United Technologies Corp. v. EPA, 821 F.2d 714, 719-720 (D.C. Cir. 1987).

[73] United Technologies Corp. v. EPA, 821 F.2d 714, 720 (D.C. Cir. 1987).

[74] Fertilizer Institute v. EPA, 935 F.2d 1303, 1307-08 (D.C. Cir. 1991)(quoting General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984), *cert. den.* 471 U.S. 1074 (1985)).

[75] Cabais v. Egger, 690 F.2d 234, 239 (D.C. Cir. 1982).

[76] Chamber of Commerce of the U.S. v. OSHA, 636 F.2d 464, 469 (D.C. Cir. 1980).

[77] Batterton v. Marshall, 648 F.2d 694, 706 (D.C. Cir. 1980).

The proper question in these cases is not whether the document *is* a legislative rule, but whether the nonlegislative document *should have been* issued as a legislative rule in the circumstances. The key to that question is, I believe, quite clear, based on analysis of the APA and of the many decided cases: *Did the agency intend the document to bind? Has the agency given it binding effect?*

III. Nonlegislative Rules with Binding Effect

Legislative rules[78] have the force of law and are legally binding upon the courts, the agency and the public.[79] Nonlegislative rules, by definition, are not *legally* binding on the courts, the agency or the public.

This Article deals with nonlegislative rules that have the purpose or effect of binding the public *as a practical matter*. These are nonlegislative documents that are intended to impose mandatory standards or obligations, or that as a practical matter are given that effect.[80]

In general, a nonlegislative document is binding as a practical matter if the agency treats it the same way it treats a legislative rule--that is, as dispositive of the issues that it addresses--or leads the affected public to believe it will treat the document that way. Certain indicia that nonlegislative documents are binding in this practical sense are clearly identifiable.

Obviously, agency *enforcement action* based upon nonobservance of the nonlegislative document, or threat of such action, bespeaks a clear intent to bind and indeed puts it into execution.[81] Here the eating is the proof of the pudding.

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[78] *See* text at notes 40-47, *supra*.

[79] *See* Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?* 7 YALE J. ON REG. 1, 3-4 n.6, 39 (1990). More precisely, rules are binding and have the force of law when a court may not review them freely, but must accept them unless they are contrary to statute or unreasonable. *Id.*

[80] This understanding, that the binding effects are practical ones and not legal ones, clarifies one of the many terminological inexactitudes that plague this field, the so-called "legal effect" test. Professor Asimow has summarized the usage of some courts and commentators: "The prevailing standard for distinguishing legislative and interpretive rules can be described as the 'legal effect' test. If a rule explaining the meaning of language actually makes 'new law,' as opposed to merely interpreting 'existing law,' it is legislative." Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform,* 1985 DUKE L.J. 381, 394. I suggest that greatly improved clarity will be achieved if it is realized that under this 'test' the court is actually looking for *practical* binding effects, *not legally* binding ones. (And of course the rule is not legislative when it was not promulgated legislatively.)

Similarly, in the setting of agency actions that pass upon applications for approvals, permits, benefits and the like, *regular application of the standards* set forth in the document evidences both the intent to bind and a practical binding effect.[82]

A document will have practical binding effect before it is actually applied if the affected private parties are reasonably *led to believe* that failure to conform will bring adverse consequences, such as an enforcement action[83] or denial of an application.[84] If the document is couched in mandatory language,[85] or in terms indicating that it will be regularly applied,[86] a binding intent is strongly evidenced.[87] In some circumstances, if the language of the document is such that private parties can rely on it as a norm or safe harbor by which to shape their actions, it can be binding as a practical matter.[88]

It is possible that an agency will use mandatory or rigid language even though it does not intend the document to be regularly applied without further consideration. There is nevertheless a practical binding effect if private parties suffer or reasonably believe they will suffer by noncompliance. This phenomenon can occur especially where the document is issued at headquarters but administered in the field.[89] Mandatory language in the document may combine with the routinized behavior of the field staff to produce a practical binding effect upon affected private parties. Though the document may not have been intended to be "finally determinative of the issues or rights to which it is addressed,"[90] its practical effect is to bind, and affected persons may not be able to risk noncompliance to test it.

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[81] *E.g.*, U.S. v. Picciotto, 875 F.2d 345 (D.C. Cir. 1989)(conviction based on violation of nonlegislative Park Service document reversed). Other examples of these categories of practical bindingness are set forth in Section IV, *infra*.

[82] *E.g.*, McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1321 (D.C. Cir. 1988)("later conduct applying it confirms [the] binding character" of the model, also evidenced by mandatory language).

[83] *E.g.*, Jerri's Ceramic Arts, Inc. v. CPSC, 874 F.2d 205, 208 (4th Cir. 1989)("the proposed statement has the clear intent of * * * providing the Commission with power to enforce violations of a new rule").

[84] *E.g.*, Lunoz v. Heckler, 800 F.2d 871 (9th Cir. 1986)(denial of Medicare coverage based on manual).

[85] *E.g.*, Community Nutrition Institute v. Young, 818 F.2d 943, 947 (D.C. Cir. 1987)("mandatory, definitive language is a powerful, even potentially dispositive, factor" suggesting that the nonlegislative rules were "presently binding norms").

[86] *E.g.*, American Bus Ass'n v. United States, 627 F.2d 525, 532 (D.C. Cir. 1980)("in reality a flat rule of eligibility").

[87] Closely parallel is the concept of expected conformity, which is important in determining whether agency action is final, FTC v. Standard Oil Co. of California, 449 U.S. 232 (1980), or ripe for judicial review, Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). *See* Southern California Advertisers' Ass'n v. FAA, 881 F.2d 672, 675 (9th Cir. 1989): "Characteristics indicating finality include providing a 'definitive' statement of the agency's position, having a 'direct and immediate' effect on the day-to-day business of the complaining parties, having the 'status of law,' and carrying the expectation of 'immediate compliance with [its] terms.'"

[88] *See, e.g.*, Community Nutrition Institute v. Young, 818 F.2d 943 (D.C. Cir. 1987); Alaska v. Dep't of Transportation, 868 F.2d 441 (D.C. Cir. 1989). *See also* Public Citizen v. NRC, 940 F.2d 679 (D.C. Cir. 1991).

Similarly, a document that initially was intended to be nonbinding, or one as to which the intent was unclear, may harden into a fixed rule, with binding effect, by repeated application.[91]

A further emblem of practical binding effect is the absence of an opportunity for affected private parties to be heard on proposed policy alternatives, before the policy set forth in the document is concretely applied to them, and to have their proposals considered with an open mind by the agency's policymakers. If the document is to be applied rigidly to private persons, without first affording them a realistic chance to challenge its policy, its binding effect is evident. By the same token, if the agency affords such an opportunity and genuinely is open to reconsideration of the policy, the document shows neither the intent to bind nor such an effect.[92]

All of these practical binding effects will be the more severe where the affected private parties, for practical reasons, cannot invoke the aid of the courts to challenge the documents.[93] Applying the above guides to determine when a document has practical binding force may not always be easy. As Judge Wald has well observed with respect to one aspect of the problem, "[d]etermining when a given agency action is interpretive or legislative[94] is an extraordinarily case-specific endeavor."[95] Similarly, Judge Starr, having stated that a "legislative rule[96] is recognizable by virtue of its binding effect,"[97] declared that "[t]his definitional principle, however, is hardly self-executing,"[98] and cited a number of "factors" to be examined.[99] That standards have a mathematical or mechanical quality is not determinative of the agency's intent or use of them to bind.[100] The availability of procedures for waiver of the rule should not change a rule from being one that binds to one that does not.[101]

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[89] *See* Section VII, *infra*.

[90] Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38 (1974).

[91] "Where the language and context of a statement are inconclusive, we have turned to the agency's actual applications." Public Citizen, Inc. v. NRC, 940 F.2d 679, 682 (D.C. Cir. 1991)(*per* S. Williams, J.) *citing* McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1320-21 (D.C. Cir. 1988); Community Nutrition Institute v. Young, 818 F.2d 943, 949 (D.C. Cir. 1987); Batterton v. Marshall, 648 F.2d 694,, 706 (D.C. Cir. 1980); American Bus Ass'n v. United States, 627 F.2d 525, 532-33 (D.C. Cir. 1980). *See also* American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1056-57 (D.C. Cir. 1987)("where the agency's characterization of its action would fit them cleanly into a §553 exemption, we think it the most prudent course to await the sharpened facts that come from the actual workings of the regulation"); notes 299-300 and accompanying text, *infra*.

[92] *See* Section VI, *infra*. The courts often say that a document is not "legislative" (or not "substantive")--meaning that it need not have been issued legislatively--if the agency has reserved discretion to act at variance with it. This notion, which I believe is flawed, is discussed below. Section VI, *infra*.

[93] Regulations may require the exhaustion of lengthy intraagency appeals before the challenged permit can be used, even on the agency's terms. *See e.g.*, 40 CFR §124.15, 124.19 (1991)(EPA).

If a rule is conclusive on one factor but reserves discretion on the second, it is not "any less of a rule * * * even though it does not purport to answer the second question."[102] Indeed, a single nonlegislative document can imaginably be a layer-cake of elements: restatement of statutory language, interpretation of statute, interpretation of legislative regulations, policy statement declaring policy that is not intended to bind,[103] and policy statement declaring policy that is intended to bind.[104] The last of these must always be carefully distinguished from the other elements, to consider whether legislative rulemaking requirements should have been observed.

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[94] Under the analysis and terminology set forth above, this effort is to distinguish an interpretive rule (as to which legislative rulemaking is not required despite the agency's efforts to bind) from a document that goes beyond interpretation and sets forth new law which the agency intends to be binding. The latter document is not a legislative rule, since it was not promulgated legislatively. It is a policy statement that *should have been* issued as a legislative rule. Thus, properly understood, the distinction is between an interpretive rule and a rule that should have been legislative.

[95] American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

[96] *See* note 94, *supra*.

[97] Alaska v. DOT, 868 F.2d 441, 445 (D.C. Cir. 1989).

[98] *Id.* at 446.

[99] The factors in that case, and in Community Nutrition Institute v. Young, 818 F.2d 943 (D.C. Cir. 1987), that reinforced the conclusion that the agency intended the action to have binding effect were: mandatory language, prior grant of "exemptions," publication in the Code of Federal Regulations, limitation upon the agency's discretion, and whether the agency could successfully prosecute persons who had complied with the document. *Id.* at 446-447.

[100] *Compare* Texaco, Inc. v. FPC, 412 F.2d 740 (3rd Cir. 1969) *with* Pacific Gas & Electric Co. v. FPC, 506 F.2d 33 (D.C. Cir. 1974).

[101] "In filing a waiver application, an operator is entitled to be confronted only with rules adopted in the procedural manner prescribed by Congress." Texaco, Inc. v. FPC, 412 F.2d 740, 746 (3rd Cir. 1969).

[102] McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1322 (D.C. Cir. 1988)(per S. Williams, J.).

[103] *See* Panhandle Producers v. Economic Regulatory Admin, 822 F.2d 1105, 1110-1111 (D.C. Cir. 1987).

A proper focus upon practical binding effects may enable us to understand why the courts have found the "distinction between legislative rules and interpretative rules or policy statements" to be "enshrouded in considerable smog" and "baffling."[105] I believe there are two principal reasons for the perplexity.

The first is that, properly understood, the distinctions call for a largely factual judgment--to pass upon the agency's intent to bind (or its practice of doing so)--without benefit of the sorts of evidence upon which factual findings are ordinarily based.[106] One needs only to sample the opinions that parse the considerations bearing upon these distinctions[107] to see that the evidence and inferences to be drawn from the administrative record are limited,[108] making the court's task difficult, though by no means impossible. It would seem quite wrong under the *Morgan IV*[109] doctrine to countenance discovery proceedings or evidentiary hearings in which officials could be interrogated about their motives or their practices. It is significant that the cases have not in any way suggested that such procedures should be allowed.[110] The necessary determinations can be facilitated by a clear recognition of the issues that bear upon the inquiry into the practical binding purposes or effects of an agency issuance.[111]

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[104] *See* Batterton v. Francis, 648 F.2d 694, 703 (D.C. Cir. 1980).

[105] Community Nutrition Institute v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987). The full quotation appears in the text at note 37 *supra*.

[106] Judge Wald has said that cases passing upon whether a rule is interpretive "turn on their precise facts." American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

[107] *E.g.*, Alaska v. DOT, 868 F.2d 441, 445-447 (D.C. Cir. 1989); American Hospital Ass'n v. Bowen, 834 F.2d 1307, 1045-1047 (D.C. Cir. 1987).

[108] In American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987), Judge Wald spoke of "the exceptional degree to which decisions in this doctrinal area turn on their precise facts."

[109] United States v. Morgan, 313 U.S. 409 (1941).

[110] *See* Public Citizen, Inc. v. NRC, 940 F.2d 679, 682 (D.C. Cir. 1991): "Where the language and context of a statement are inconclusive, we have turned to the agency's actual application")(per S. Williams, J.).

[111] The courts have suggested that the burden is on the agency to show that its act is within an exemption to §553. "The issue here is whether the agency has demonstrated that this case is governed by the exceptions to section 553." Guardian Federal Savings & Loan Ass'n v. FSLIC, 589 F.2d 658, 663 (D.C. Cir. 1978)(Leventhal, J.); "The exceptions to section 553 will be 'narrowly construed and only reluctantly countenanced'", Alcaraz v. Block, 746 F.2d 593, 612

The second reason the courts have found the distinction troubling, I would suggest, is one which has already been described: the reigning confusion in the use of terms and their accompanying concepts. It must be clearly grasped that rules which interpret or declare policy can be either legislative or nonlegislative, that those not issued legislatively cannot ever "be" legislative rules although perhaps they should have been, and that nonlegislative rules which do not interpret (or which "go beyond the statute" in an attempt at interpretation) are properly understood to be policy statements within the APA taxonomy and must be so treated for determining whether they should have been issued legislatively.

IV. Examples of Agency Use of Nonlegislative Policy Documents to Bind the Public

Our focus now narrows to the category of nonlegislative policy documents that the agency makes binding upon the public. Again, these documents are "policy statements" within the APA, rather than interpretive rules.[112] An agency may use interpretive rules in a manner that makes them binding as a practical matter,[113] but it may not so use policy documents.[114] The examples that follow illustrate agency use of nonlegislative policy documents to bind the public.

Though it is not necessary to do so, the examples are grouped for convenience into the categories of enforcement cases, application-and-approval cases, and benefit and reimbursement cases, with separate attention to cases involving administration by the states. The phenomenon of the regular application of nonlegislative policy documents by field offices of the federal agency and by the states will be discussed at a later point, apart from presentation of these examples.

The majority of the examples are drawn from adjudicated cases. Because the courts have documented and organized the facts, these examples have been relatively easy to gather and can be summarized in a relatively simple fashion. Other examples, collected from noncase sources, have generally required more extensive presentation and documentation.

In the examples drawn from decided cases, unless otherwise stated, the agency's use of the nonlegislative document was in each instance disapproved

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(9th Cir. 1984)(Wallace, J.), *quoted in* American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987)(Wald, C.J.) and in numerous other cases.

[112] *See* text at notes 64-69 *supra*.

[113] *See* text at notes 2-5, *supra*.

[114] *See* text at notes 6-10 *supra* and Section V, *infra*.

by the court for the reason that the agency had failed to observe legislative rulemaking procedures.[115] This disposition will therefore not be recited in the individual examples. And rather than appending a footnote to every declarative sentence, this section uses a single citation for each case example in its entirety, unless reason exists for more.

A. Use of Nonlegislative Policy Documents in Direct Enforcement

Occasionally agencies rely upon guidances or other nonlegislative policy documents as the law under which to bring or threaten direct enforcement actions in court or within the agency.

A-1. A demonstrator at Lafayette Park in front of the White House was prosecuted for violating "conditions," issued but not made part of its regulations by the United States Park Service, that restricted the storage of property in the Park.[116]

A-2. The government sought an injunction and civil penalties in district court for violation of the terms of a memorandum sent by the Environmental Protection Agency's Director of Control Programs to the EPA regional office air program chiefs, imposing stricter requirements (through a new method of computing) than the duly-promulgated state implementation plan in question.[117]

A-3. One alleged violation remained after the Food and Drug Administration had inspected the plant of a manufacturer of medical apparatus, and the government pressed suit to enjoin it. The company had fallen short of a sterility standard that had been set forth in draft "inspectional guidelines" circulated by FDA's compliance office to its inspectors.[118]

A-4. The Administrator of OSHA spoke at a labor union convention and followed up with a document captioned "interpretive rule and general statement of policy," to the effect that employers would be charged with discrimination unless they paid wages to union representatives who accompanied OSHA personnel conducting inspections of the employers' premises, despite that absence of any such provision in the Occupational Safety and Health Act.[119]

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[115] "Normally, a judicial determination of procedural defect requires invalidation of the challenged rule." Batterton v. Marshall, 648 F.2d 694, 711 (D.C. Cir. 1980).

[116] United States v. Picciotto, 875 F.2d 345 (D.C. Cir. 1989)(document held "null and void"; conviction reversed).

[117] United States v. Zimmer Paper Products, Inc., 20 E.L.R. 20556 (S.D. Ind. 1989)(memorandum held of no effect).

[118] United States v. Bioclinical Systems, Inc., 666 F.Supp. 82 (D. Md. 1987)(injuction denied; "At bottom, what the Government is asserting here is that * * * the SAL [sterility assurance level] should be what the Office of Compliance dictates it to be").

A-5. The Consumer Products Safety Commission through a "statement of interpretation" eliminated an exclusion to its Small Parts Rule, violation of which could invoke a range of civil and criminal penalties provided by statute. The court found that the statement did not interpret, but amounted to an attempt to impose new duties having the force of law.[120]

A-6. Through an "order," which it argued was a policy statement within the APA exemption, the Federal Power Commission for the first time directed operators to pay interest on refunds it had ordered.[121]

A-7. Acting under statutory provisions outlawing discrimination against the handicapped by institutions receiving federal assistance,[122] the Secretary of HHS without notice and comment issued an immediately effective "interim final regulation" requiring hospitals to post notices that discriminatory denial of food and customary medical care to a handicapped infant is unlawful.[123] Because the regulation was "intended, among other things, to change the course of medical decisionmaking,"[124] it affected substantive rights and was not an interpretation, and therefore was "declared invalid due to the Secretary's failure to follow procedural requirements in its promulgation."[125]

A-8. The Food and Drug Administration's regulations requiring tamper-resistant packaging for certain over-the-counter drug products[126] were augmented by a 1988 Compliance Policy Guide ("CPG"),[127] stating the agency's conclusion that certain packaging technologies (tinted wrappers, and cellophane with overlapping end flaps) are "no longer acceptable."[128] A CPG such as this one may be an example of an advisory opinion which the FDA states "may be used in administrative or court proceedings to illustrate acceptable and unacceptable procedures or standards, but not as a legal requirement."[129] However, if a drug company were wilfully to use tinted wrappers or cellophane in violation of the CPG, it could hardly be doubted that the FDA would initiate some sort of enforcement action.[130]

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[119] Chamber of Commerce of the United States v. OSHA, 636 F.2d 464 (D.C. Cir. 1980)(rule vacated; "most important of all, high-handed agency rulemaking is more than just offensive to our basic notions of democratic government; a failure to seek at least the acquiescence of the governed eliminates a vital ingredient for effective administrative action").

[120] Jerri's Ceramic Arts, Inc. v. CPSC, 874 F.2d 205 (4th Cir. 1989)(document set aside).

[121] Texaco, Inc. v. FPC, 412 F.2d 740 (3rd Cir. 1969)(order set aside).

[122] Rehabilitation Act of 1973 §504, 29 U.S.C. §794 (1988).

[123] 48 Fed. Reg. 9630 (Mar. 7, 1983)(the "Baby Doe regulation").

[124] American Academy of Pediatrics v. Heckler, 561 F.Supp. 395, 401 (D.D.C. 1983).

[125] *Id.* at 400.

[126] 21 CFR §211.132.

[127] Food and Drug Administration, Compliance Policy Guide 7132a.17, Mar. 1, 1988.

[128] *Id.* at 2.

A-9. Under the amended Motor Vehicle Cost Savings and Information Act, manufacturers were required to meet average fuel economy standards.[131] EPA's responsibilities under the Act included establishing, "by rule," test and calculation procedures,[132] and to conduct the tests and calculate manufacturers' corporate average fuel economy ("CAFE") ratings. A manufacturer that failed to meet its CAFE standard by as little as 1/10 of a mile per gallon could incur millions of dollars in civil penalties.[133] EPA was criticized by the Comptroller General for its use of advisory circulars to make changes in the tests instead of performing legislative rulemaking.[134]

A-10. Nonlegislative provisions in USDA manuals are legion, and they are enforced. A large number were cited to the author by USDA senior attorneys.[135] Here are some examples from the manuals of the Animal and Plant Health Inspection Service:

> a) A Veterinary Services memorandum went beyond the requirements of statute and regulations[136] to add a requirement that all containers used for exportation of animal embryos or semen (except to Canada) must be marked with a legend stating that they must be cleaned and disinfected before return to the United States[137]. A person contemplating export could fairly expect that, if the legend were not included, the inspector

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[129] 21 CFR §10.85(j)(1990).

[130] Though one would not expect any regulated company to flout the agency's policy in this particular, this fact does not change the bindingness that arises from the evident agency intent to require affected parties to obey the CPG's prohibitions. Potential penalties include injunction (21 U.S.C. §332), seizure (21 U.S.C. §334) and criminal prosecution (21 U.S.C. §333).

[131] 15 U.S.C. §§2001-2012 (1982).

[132] 15 U.S.C. §2003(d)(1)(1982),

[133] Opinion of the Comptroller General No. B-217744 at 2 (Letter of June 3, 1985 from Milton J. Socolar for the Comptroller General to Senator John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives).

[134] "[C]hanges should have been made formally [by legislative rulemaking], unless one of the specific limited exceptions applied to a particular change." *Id.* at 1. *See also Id.* at 8.

[135] Interview with John Golden, Associate General Counsel, USDA; Ronald Cipolla, Assistant General Counsel, USDA; William Jenson, Senior Counsel, USDA; Thomas Walsh, Assistant General Counsel, USDA; Robert Paul, Deputy Assistant General Counsel, USDA; and Harold Reuben, Deputy Assistant General Counsel, USDA (July 9, 1991).

[136] 9 CFR Part 98 (1991).

[137] Veterinary Services Memorandum No. 592.111 (Feb. 6, 1991).

would forbid the export, or would cite a violation if export were attempted.[138]

b) The gypsy moth regulations specify a list of "regulated articles" subject to quarantine restrictions upon interstate movement.[139] Under the rubric "[i]f the article is one of the following, then it's regulated," the manual adds a substantial and entirely new category, "timber and timber products."[140]

c) Certain garbage deriving from food is regulated to avert disease; the regulations provide that "regulated garbage" shall be moved and unloaded under the direction of a USDA inspector,[141] but the manual requires that regulated garbage may be transported only by an approved vessel.[142]

d) The same regulations call for sterilization of regulated garbage by cooking and burial of the residue in a landfill, except that burial is not required for materials extracted from the residue in certain cases.[143] The manual calls for burial of all sterilized garbage.[144]

e) Regulations require that pet birds of United States origin which have been outside the United States of more than 60 days must be confined at the place where the birds are available for inspection for a minimum of 30 days.[145] The manual requires quarantine at the owner's residence.[146]

A-11. The Department of Transportation as successor to the Civil Aeronautics Board issued, without recourse to notice-and-comment rulemaking procedures, an "Order Granting Exemption" followed by an "Order Amending Exemption" and an "Order Clarifying Amendment to Exemption."[147] Their upshot was that air travel advertisements may state certain taxes and surcharges separately from the basic fares, without being regarded as "unfair or deceptive practices or unfair methods of competition" within the meaning of the Federal Aviation Act's analog[148] to section 5 of the Federal Trade Commission Act.[149] After several states, at the recommendation of the National Association of Attorneys General, adopted statutes that conflicted with the FAA position, the federal agency responded that "the Federal government has preempted this aspect of state advertising regulation."[150] Twenty-seven states successfully sued to have the actions set aside.[151]

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[138] Interviews with William Jenson, Senior Counsel, USDA, in Washington, D.C. (July 7, 1991 and Sept. 5, 1991).

[139] 7 CFR §301.45-1(x)(1991).

[140] Animal and Plant Health and Inspection Service, USDA, Gypsy Moth Program Manual p. 9.3 (1990).

[141] 9 CFR §94.5(f)(1)(1991).

[142] Animal and Plant Health and Inspection Service, USDA, Airport and Maritime Operations Manual, p. 3.40a (Apr. 23, 1991).

[143] 9 CFR §94.5(h)(2)(1991).

[144] Animal and Plant Inspection Service, USDA, Airport and Maritime Operations Manual, p. 3.40a (Apr. 23, 1991)

[145] 9 CFR §92.101(c)(2)(B)(*1*) (1991).

[146] Animal and Plant Health and Inspection Service, USDA, Airport and Maritime Operations Manual, p. 3.30 (Apr. 23, 1991).

[147] Alaska v. Dep't of Transportation, 868 F.2d 441 (D.C. Cir. 1989).

The private party can be placed in a particularly difficult position when the agency can take enforcement action without prior recourse to the courts or even to agency hearing procedures.

A-12. An inmate working in the Federal Prison Industries Program refused to comply with a "program statement" that called for remittance of 50% of his prison earnings to pay off certain obligations, preferring to send the money to his wife. He was accordingly fired from his prison job. Thus the document was made binding by the sanction of dismissal. Although the program statement was couched in less-than-mandatory terms and was argued by the government to be an interpretive rule, it was applied in an absolute manner.[152]

A-13. An assistant regional manager of the Federal Aviation Administration sent a letter to Los Angeles area pilots and operators of banner-towing airplanes, declaring that they no longer could fly through a corridor in the Los Angeles terminal control area. Since the directive would be implemented by the FAA's air traffic controllers denying clearances to transit the corridor, the pilots would be put out of business without any judicial action by the FAA. The court held the letter was a "rule" within the APA and was reviewable as final agency action.[153]

A-14. In a similar pattern, the FAA sent a letter to aerial sports parachuting operators, stating that parachuting would no longer be permitted in a previously-designated jump zone adjacent to and within the San Diego terminal control area. The court again held the letter to be a "rule" and reviewable final action.[154]

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[148] 49 U.S.C. §1381 (1988).

[149] 15 U.S.C. §45(a)(1) (1988).

[150] *Id.* at 442-443.

[151] *Id.* at 445 ("DOT's actions are strikingly similar (and in all principled respects, the same as) that deemed to constitute a legislative rule in *Community Nutrition Institute*_[v. Young, 818 F.2d 943 (D.C. Cir. 1987)]; we therefore conclude that the 1988 Orders are invalid by virtue of the Department's failure to employ notice-and-comment procedures").

[152] Prows v. U.S. Dep't of Justice, 704 F.Supp. 272 (D.D.C. 1988)(program statement held null and void), *aff'd*, 938 F.2d 274 (D.C. Cir. July 12, 1991).

[153] Southern California Aerial Advertisers' Ass'n v. FAA, 881 F.2d 672 (9 Cir. 1989)(letter held invalid).

A-15. A FDA "import alert" required FDA agents at United States ports of entry to detain reimported American-made pharmaceuticals unless the importer could document their full chain of custody while abroad. Under this document, FDA ordered an importer's goods to be reexported or destroyed within 90 days, but agreed to a stay during which the importer was able to obtain judicial relief.[155]

A-16. United States Department of Agriculture meat inspectors base their evaluations on inspection manuals and bulletins to the field, only relatively minor parts of which are promulgated through legislative rulemaking procedures. The inspectors have the power temporarily to close down a packing line for serious violations, until the plant comes into compliance. The immediate economics of the situation tend to compel the packers to comply with the rules thus enforced rather than to endure a shutdown and await relief in court.[156]

Statements of enforcement policy are ordinarily issued nonlegislatively. These statements typically set forth the criteria by which the agency will select cases for prosecution or other enforcement action. Often they are lengthy and detailed, articulating quite specific standards.[157] To the extent they interpret statutory language that has some tangible meaning, these documents pose little problem, since the agency may lawfully attempt to make them bind.[158] Similarly, where the statement provides for the future exercise of discretion in its application, notice and comment are not required.[159]

But what of statements setting enforcement policy under broad language like "just and reasonable" or "unfair"? These in themselves consititute a vast subject, lying beyond the scope of this study. But some elements should be touched upon. First is the question whether a given statement interprets sufficiently concrete statutory language to qualify as interpretive.[160] If it is concluded that the statement is not interpretive, there remain questions of what it intends substantively and whether it is meant to be binding. Those things can be hard to determine.[161] There appear to be at least three possibilities:

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[154] San Diego Air Sports Center, Inc. v. FAA, 887 F.2d 966 (9th Cir. 1989)(letter held invalid).

[155] Bellarno Int'l Ltd. v. FDA, 678 F.Supp. 410 (E.D.N.Y. 1988)(import alert held unlawful).

[156] Interview with John Golden, Associate General Counsel, U.S. Dep't of Agriculture, in Washington, D.C., (Apr. 9, 1991).

[157] *See, e.g.*, the Guides and Practice Rules of the Federal Trade Commission, 16 CFR Parts 17-24, 228-259(1991).

[158] *But see* the recommendations, text accompanying notes 319-328 *infra*.

Enforcement policies that set priorities primarily in terms of resource allocation rather than in substantive terms ordinarily will not pose difficulties for present purposes.

[159] *See* Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1012-15 (9th Cir. 1987); Section VI, *infra*.

> 1) Sometimes the agency is stating a safe-harbor policy, such that private persons may know that if they observe the policy they will not be deemed in violation and will not be prosecuted. But they will not necessarily be deemed in violation, or be prosecuted, if they do not observe the policy. Such a document can create binding norms.[162]
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> 2) The agency may intend that the document, for the purposes of administration and enforcement, will authoritatively define the offense. Then, any nonobservance is subject to enforcement action while observance comes within a safe harbor. This approach creates a norm that has practical binding effect.
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> 3) The agency may try to have it both ways--that is, to hold affected parties to the standards set in the enforcement policy, but deny the document a role as a safe harbor, thereby reserving the freedom to

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[160] To the extent the FTC Guides and Trade Practice Rules, note 157, *supra*, set forth detailed forms of misrepresentation or deception in industry-specific terms, they arguably are interpretive of the statutory term "unfair or deceptive acts of practices," Federal Trade Commission Act §5, 15 U.S.C. §5 (1988). These statutory words are broad but nevertheless have some tangible meaning when applied in a "negative" way--that is, to condemn acts which by common usage or general acceptation are "unfair or fraudulent or tricky." Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935)(Cardozo, J., concurring). But where the rules use the statutory words in a "positive" way--not merely to require refraining from unfair or deceptive acts but to require affected parties to perform affirmative acts to be safe from prosecution--it would seem hard to say they draw any tangible meaning from the statutory language. To that extent these rules are policy statements, since they are not interpretive. *See* text at notes 61-68, *supra*. It is worth noting that analogous documents issued by the Department of Transportation under its statutory authority over "unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof," 49 U.S.C. §1381 (1988), were held *not* to be interpretive. Alaska v. Dep't of Transportation, 868 F.2d 441, 445-447 (D.C. Cir. 1989).

[161] *See* Public Citizen v. NRC, 940 F.2d 679 (D.C. Cir. 1991)("policy statement" identifying practices that expose the public to radiation in such minute amounts as to be "below regulatory concern"; held unripe for review).

[162] *E.g.*, Community Nutrition Institute v. Young, 818 F.2d 943 (D.C. Cir. 1987). The Food and Drug Administration's policy statement set forth "action levels," informing food producers of the allowable levels of unavoidable contaminants. These were safe harbor rules in the style of #1 in the text above. The combination of "mandatory, definitive language," *id.* at 947, with the agency's "own course of conduct," *id.* at 949, gave the documents a "present, binding effect," *ibid.*, and led the court to hold the action levels "to be invalid in that they were issued without the requisite notice-and-comment procedures." *Id.* at 950. *See also* Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 535-537 (D.C. Cir. 1986).

> proceed against persons who conform to it but for other reasons are deemed in violation of the statute. This again can create a practical binding effect.

Affected persons may flout these rules only at their peril. The agencies rarely will declare which of the three approaches they are taking. The usual disclaimers are consistent with all three,[163] leaving affected private parties in a condition of uncertainty as to which approach is intended and as to its practical binding force.[164]

B. Use of Nonlegislative Policy Documents to Pass Upon Applications

Nonlegislative policy documents are often the vehicles by which the agencies establish standards for approving or granting applications submitted by private parties. If the standards are intended to be routinely applied, or if they *are* regularly applied, they of course have a practical binding effect, even though they are not legally binding. This is true whether the applicant is able to challenge the document in court or not.

Frequently the applicant is under some sort of practical compulsion to seek the agency's approval. Guidances or manuals or other nonlegislative documents that set standards for an approval that the applicant must have as a business necessity, for example, or as the means of sustaining livelihood, acquire a particularly potent mandatory force. Where denial would place the applicant in a position of noncompliance with the risk of penalties, or would deprive him or her of essential sustenance, the standards as a practical matter amount to immediately enforceable regulatory norms--indeed, self-executing ones, since applicants in these circumstances have little choice but to accept the agency's terms. And because these applicants are typically unable to tolerate the delay or cost that a contest would entail, the documents and the norms they establish will often elude judicial scrutiny.

B-1. The Interstate Commerce Commission adopted a "policy statement," concerning applications for operating authority to and from Canada, which had the effect of releasing shippers from legally enforceable duties and constraints.[165] The court found it to be a "flat rule of eligibility" that "purports on its face to notify applicants for certificates precisely what showings the Commission will or will not require of them."[166]

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[163] *See, e.g.*, 16 CFR Part 17 (1991).

[164] An example of this problem is the Fish and Wildlife Service's announcement on the northern spotted owl, discussed in Section VII *infra*.

[165] American Bus Ass'n v. United States, 627 F.2d 525, 533 (D.C. Cir. 1980)(statement held unlawful).

B-2. An ICC "Restriction Removal Statement" contained "guidelines" that were prefaced by a declaration that they were not intended to prejudge any individual application. But the court found that "there are sinews of command beneath the velvet words of the subsequent sections of the guidelines," and that the guidelines as a whole were "decorated with words that appear to be carefully chosen to avert classification as rules."[167] The court remarked further that the "manner of dealing with applicants who do not follow what is declared to be the 'normal' course demonstrates graphically that the carrier who does not conform will incur both delay and potentially vast litigation expense."[168] This practical binding effect reinforced the conclusion that "these are not guidelines but normative rules."[169]

B-3. In another ICC case, the agency published an announcement in the FEDERAL REGISTER that it was cancelling all existing "special permission authorities" and that these authorities would no longer be issued.[170]

B-4. The Department of Labor's program handbook for employment of workers holding H-2A visas changed the definition of "prevailing practices," thereby (as charged by the plaintiff farmworkers' advocacy group) relaxing the standards to which employers must adhere. The document as so amended was published in the FEDERAL REGISTER as an "informational notice" but no comment was sought. Government counsel conceded that the handbook was "mandatory" and "binding."[171]

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[166] *Id.* at 532.

[167] American Trucking Ass'ns, Inc. v. ICC, 659 F.2d 452, 463 (5th Cir. 1981)(guidelines held invalid).

[168] *Id.* at 463-464.

[169] *Id.* at 464. The court quoted Brown Express, Inc. v. United States, 607 F.2d 695, 701 (5th Cir. 1979)("An announcement stating a change in the method by which an agency will grant substantive rights is not a 'general statement of policy.'") Of course, this document *was* a general statement of policy as defined by the analysis in this Report, text at notes 64-68 *supra,* but the court was saying that it *should have been* promulgated as a legislative rule.

[170] American Trucking Ass'n, Inc. v. United States, 688 F.2d 1337, 1347-1348 (11th Cir. 1982)(document held invalid; "the fact that the prospective announcement affects a discretionary function does not deprive it of its rulemaking quality").

[171] Comite de Apoyo para los Trabajadores v. Dole, 731 F.Supp. 541, 545 (D.D.C. 1990)(agency was directed to engage in informal notice and comment rulemaking with respect to the definition of 'prevailing practice').

B-5. The Chief of the Guaranteed Student Loan Branch of the Department of Education replied by an individual letter[172] to an inquiry from the New York State Higher Education Services Corporation, concerning the eligibility for a new loan of a borrower whose prior loan had been discharged as a result of his total and permanent disability.[173] The letter specified that an otherwise eligible applicant is ineligible for a further loan unless he or she reaffirms the previously discharged loan and meets certain other conditions, and that a loan made without observing these requirements would not be covered by federal reinsurance.[174] Although the author of the letter spoke of it as an "interpretation", it would seem difficult to point to specific language in the statute[175] that could yield so detailed an interpretation. The threatened sanction compels compliance by the lending institution and the state-based guarantor organization, though legislative rulemaking was not used.[176] The author of the letter requested that it be circulated to guarantor organizations nationwide through their trade association,[177] thus making its requirements known to those other than its addressee who might be affected.

B-6. In 1988 the Assistant Secretary of Labor for Mine Safety and Health established a "Directives System" and manual to provide guidance on how the Mine Safety and Health Administration (MSHA) applies the Federal Mine

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[172] Letter from Saul Moskowitz, Chief, Guaranteed Student Loan Branch, Division of Policy and Development, U.S. Dep't of Education, to Milton Wright, Vice President, Division of Guaranteed Loan Programs, N. Y. State Higher Education Services Corp. (Sep. 1, 1989).

[173] The Higher Education Act of 1965 requires the Secretary of Education to discharge liability on the loan of a student borrower who dies or becomes permanently and totally disabled. 20 U.S.C. §1087 (1988).

[174] Letter from Saul Moskowitz, *supra* note 172, at p. 1.

[175] 20 U.S.C. §1087 (1988).

[176] The letter, note 172 *supra*, stated: "We intend to include our policy in this area in an upcoming notice of proposed rulemaking." At 2. Such provisions were included in the Notice of Proposed Rulemaking, Guaranteed Student Loans, 55 Fed. Reg. 48324, 48342, 48359 (Nov. 20, 1990). These proposed rules have not yet been adopted.

[177] "[P]lease understand that the Department's interpretation of an applicable statute or regulation need not be codified in regulation or memorialized in a Dear Collleague letter to be considered an official Department position. The expression of that view by an authorized Department representative is sufficient. Nevertheless, we agree that this Departmental interpretation is of sufficient general interest and importance that all guarantee agencies should be made aware of it. To that end, we are providing a copy of this letter to the National Council of Higher Education Loan Programs, which we have asked to distribute this guidance to its members." *Id.* at 2.

It should be noted that by statute "any rules, regulations, guidelines, interpretations, orders or requirements of general applicaiblity prescribed by the [Department of Education]," 20 U.S.C. §1232(a)(1), must comply with the rulemaking procedures of APA §553 and certain additional special requirements. 20 U.S.C. §1232 (b)-(g).

Safety and Health Act of 1977 and the corresponding regulations.[178] The system is updated by nonlegislatively issued[179] program policy letters (PPLs), which in many cases establish new requirements going beyond the regulations or impose new penalties or penalty schedules.[180] An example is PPL P89-11-8, which sets forth specific criteria to be met for approval of electrical equipment that incorporates methane monitors.[181] The pertinent regulation governing electrical equipment[182] speaks of rugged construction, sound engineering, and safety for the intended use, but does not specify engineering criteria for particular types of electrical mining equipment. The quite specific requirements of the electical equipment PPL, which are stated in mandatory terms, arguably amount to an interpretation of the regulation, though the PPL recites that the pertinent Part of the regulations "presently does not contain requirements relative to the use of methane monitors on permissible equipment."[183] A manufacturer who does not meet the standards will be denied the certificate of approval needed to market the equipment, and operators using unapproved equipment face citation and enforcement action.

B-7. The EPA used a nonlegislatively-announced "model" to predict, based on "reasonable worst case assumptions," the "leachate levels" of wastes which applicants petitioned to have removed from the list of hazardous wastes subject to regulation under the Resource Conservation and Recovery Act.[184]

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[178] MSHA Administrative Policy and Procedures Manual, Vol. II, Chapter 100, July 17,1990 (Release II-4).

[179] *But see* 30 U.S.C. §881(a)(1988): "The Secretary shall by rule in accordance with procedures set forth in this section and in accordance with section 553 of title 5, United States Code (without regard to any reference in such section to sections 556 and 557 of such title), develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines."

[180] A 1990 PPL established higher penalties for mine operators or contractors with an "excessive history of violations" (defined for the first time in the PPL). "Increased Assessments for Mines with Excessive History of Violations," PPL No. P90-III-4, effective May 29, 1990. An MSHA administrative law judge held that "notice and comment under the Administrative Procedure Act are necessary before the program policy letter can be effective." MSHA v. Drummond Co., Inc., Docket No. SE 90-126, A.C. No. 01-00323-03638 at 16 (Mar. 6, 1991).

[181] "Approval of Methane Monitors Incorporated in the Design of Electric Equipment," PPL No. P89-11-8 (Aug. 29, 1989).

[182] 30 CFR §18.20(b)(1990).

[183] PPL No. P89-11-8, note 181, *supra,* at 1. The PPL recites that the regulations contain requirements for the use of methane monitors generally, but that these "cannot be evaluated as a part of the approval" of equipment. *Ibid.*

[184] McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1319 (D.C. Cir. 1988). *See also* Pharmaceutical Mfrs. Ass;n v. Finch, 307 F.Supp 858 (D. Del. 1970)(criteria detemined nature of satisfactory tests needed to obtain approval).

EPA argued that the model as a policy statement was exempt from notice-and-comment requirements. In an incisive and highly significant opinion, Judge Stephen Williams observed that the document's mandatory language "suggests the rigor of a rule, not the pliancy of a policy,"[185] and that the agency's "later conduct applying it [rigidly] confirms its binding character."[186] "The agency treated the model as conclusively disposing of certain issues * * *. On those issues, EPA was simply unready to hear new argument. The model thus created a norm with 'present-day binding effect' on the rights of delisting petitioners."[187]

B-8. A landowner sought to fill portions of its property for building development.[188] The Clean Water Act prohibits the discharge of any "pollutant" (including dredged or fill material) into "navigable waters" except in compliance with a permit issued by the Department of the Army under the Act.[189] The term "navigable waters" is defined to include "the waters of the United States."[190] The Army Corps of Engineers' regulations claim jurisdiction over "waters of the United States" as including "all other waters * * * which could affect interstate or foreign commerce * * * ."[191]

The Corps' Deputy Director for Public Works issued a memorandum to all district Corps offices listing seven categories having a sufficient connection with interstate commerce to warrant the exercise of jurisdiction over isolated waters, including "[w]aters which are used or could be used as habitat by other migratory birds which cross state lines."[192] This memorandum potentially swept into the regulatory regime millions of acres of land for which a permit would be required to fill. The Corps asserted jurisdiction over the land involved in the present case on the ground that the portions of it that were wetlands (though not water) could be used as habitat by "not ducks or geese, but woodpeckers, songbirds, etc."[193] The court held that "the Corps intended the November 8, 1985 Kelly Memorandum [to be] binding and intended that it take effect immediately,"[194] and set it aside for failure to observe APA notice-and-comment requirements.[195]

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[185] *Id.* at 1320-21.

[186] *Id.* at 1321.

[187] *Ibid.*

[188] Tabb Lakes Ltd v. United States, 715 F.Supp. 726 (E.D. Va. 1988), *aff'd mem.*, 885 F.2d 866 (4th Cir. 1989).

[189] 33 U.S.C. §§1311(a), 1344(a), 1362(6),(12) (1988).

[190] 33 U.S.C. §1362(7) (1988).

[191] 33 CFR §328.3(a)(3) (1990). Congress intended to confer a broad grant of jurisdiction in the Clear Water Act, extending to any aquatic features within the reach of the commerce clause. *See* Leslie Salt Co. v. Froehlke, 578 F.2d 742, 755 (9th Cir. 1978); California v. EPA, 511 F.2d 963, 964 n.1 (9th Cir. 1975), *rev'd on other grounds*, 426 U.S. 200 (1976).

[192] Memorandum of Brig. Gen. Patrick J. Kelly, Deputy Director for Civil Works, U.S. Army Corps of Engineers (Nov. 8, 1985), *quoted in* Tabb Lakes Ltd. v. United States, 715 F.Supp. 726, 728 (E.D. Va. 1988), *aff'd mem.* 885 F.2d 866 (4th Cir. 1989).

B-9. Although the court held the document involved to be a proper policy statement, the well-known *Pacific Gas and Electric* case[196] may nevertheless offer a useful illustration. In view of the diversity of curtailment plans submitted by pipeline companies in response to a gas shortage, the Federal Power Commission promulgated a "Statement of Policy" which "set forth the Commission's view of a proper priority schedule" and "further state[d] the Commission's intent to follow this priority schedule unless a particular pipeline company demonstrates that a different curtailment plan is more in the public interest."[197] The provisions of the statement were clear and definite, and were couched largely in mandatory terms, but also stated that "[w]hen applied to specific cases, opportunity will be afforded interested parties to challenge or support this policy through factual or legal presentation."[198] Largely on the basis of interpreting this and related language favorably to the Commission, the court upheld the document. However, one may suspect that, despite the language declaring its tentative effect, the document would lead affected parties to believe it would be rigorously applied and therefore would bind as a practcial matter. Perhaps the court had similar doubts in mind when it cautioned: "We expect the Commission * * * to refrain from treating Order No. 467 as anything more than a general statement of policy."[199]

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[193] Tabb Lakes Ltd. v. United States, 715 F.Supp. 726, 728 (E.D. Va. 1989), *aff'd mem.*, 885 F.2d 866 (4th Cir. 1989).

[194] *Id.* at 729.

[195] *Ibid.* The Kelly Memorandum was arguably an interpretation of the regulation, 33 CFR §328.3(a)(3) (1990), text at note 189 *supra*. A later similar statement contained in FEDERAL REGISTER preambular comments upon the regulation was apparently assumed to be interpretive in Leslie Salt Co. v. United States, 896 F.2d 354, 360 (9th Cir. 1990), *cert. den.* 111 S.Ct. 1089 (Feb. 25, 1991). On this view, it would not be improper under the APA for the Corps to employ a memorandum rather than a legislative rule to announce a position it intended to make binding. *See* notes 3-5 and accompanying text, *supra*. The huge and debatable extension of jurisdiction it asserted, however, illustrates the good sense of using notice-and-comment rulemaking procedures for the promulgation of interpretations that substantially enlarge the agency's claim of jurisdiction, as recommended in this Report. *See* text at notes 326-328, *infra*.

The entire field of wetlands regulation has been the focus of enormous ongoing controversy. *See. e.g.*, Senator Johnston's proposed amendment to the Clean Water Act that would deny the use of funds to identify or delineate wetlands under any "manual that was not adopted in accordance with the requirements for notice and public comment of the rule-making process of the Administrative Procedure Act." Amdt. No. 570, 102nd Cong., 1st Sess., 137 Cong. Rec. S9342 (daily ed. July 9, 1991). *See also* Michael Weisskopf, *Wetlands Protection and the Struggle Over Environmental Policy,* Washington Post, Aug. 8, 1991, at A17; Editorial, *How Wet is a Wetland?*, Washington Post, Aug. 7, 1991, at A14; Editorial, *Bush's Swamp Thing,* Wall St.J., July 25, 1991. On August 14, 1991, the EPA, Corps of Engineers, Soil Conservation Service and Fish and Wildlife Service jointly published in the Federal Register (56 Fed. Reg. 40446) a proposed revision of the controversial wetlands manual. The prefatory material stated that "the proposed Manual on which we are soliciting public comment is a technical guidance document and provides internal procedures for agency field staff for identifying and delineating wetlands. Both versions of the document serve to advise the public prospectively of the manner in which agency personnel will apply the definition of wetlands to particular sites on a case-by-case basis." *Id.* at 40446.

[196] Pacific Gas & Electric v. FPC, 506 F.2d 33 (D.C. Cir. 1974).

[197] *Id.* at 36.

Although regarded by some as a champion in the game of "rule by memorandum," the EPA has recently shown signs of recognizing its obligation to promulgate legislative rules when it intends to bind the public. Twice in the last year or so it has backed away from actions that manifestly were based upon the premise that nonlegislative policy documents may be enforced or applied in the same binding way as legislative rules are.

B-10. In the preamble to a final rule approving revisions in Kentucky's state implementation plan under the Clean Air Act,[200] EPA had stated that, in view of the complexity of the subject matter, "[i]t would be administratively impracticable . . . to amend the regulations and the SIPs [state implementation plans] every time EPA . . . issues guidance regarding the proper implementation of the NSR [new source review] program. . . . Rather, action by EPA to approve [revisions to a SIP] has the effect of requiring the State to follow EPA's current and future interpretations of the Act's provisions and regulations, as well as EPA's operating policies and guidance . . . ."[201] This is a rather explicit declaration by EPA of its intent to bind through nonlegislative issuances. Obviously, if EPA interpretations and guidances are binding on the states in their implementation of the clean air laws, they are binding upon private parties who must gain the states' approval of their permit applications. EPA stated further that it "may deem inadequate" a state-issued permit not reflecting these positions, and "may consider enforcement action . . . to address the permit deficiency."[202]

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[198] *Id.* at 50.

[199] *Id.* at 43.

[200] Approval and Promulgation of Implementation Plans, Kentucky, 54 Fed. Reg. 36307 (Sept. 1, 1989).

[201] *Id.*, at 36307-08.

[202] *Id.*, at 36308.

After protest and commencement of litigation, EPA issued a "Notice of Clarification"[203] in which it stated that interpretations and guidance do not have "independent status . . . such that mere failure to follow such pronouncements, standing alone, would constitute a violation of the Clean Air Act. . . . [I]n defending against such an enforcement action [*i.e.*, one based on such interpretations or guidances], a party is free to assert that EPA has not reasonably interpreted the underlying statutory and regulatory provisions."[204] The agency properly receded from the assertion that its informal documents are in themselves binding, and recognized that they are subject to challenge.[205]

B-11. In a second example, EPA agreed to use legislative rulemaking to promulgate a policy it had for several years enforced through informal documents. The Clean Air Act establishes requirements to "prevent significant deterioration" of air quality in "attainment" areas--that is, those regions where national air quality standards are currently satisfied with respect to given pollutants.[206] Those seeking to construct a new major emitting facility or a major modification to an existing facility must obtain a permit from the permitting authority (EPA, or the state under a delegation or other arrangement with EPA).[207] The permit must include, among other things, emission limitations based on the "best available control technology" ("BACT").[208] The BACT for any facility is "an emission limitation based on the maximum degree of reduction of each pollutant . . . which the permitting authority, on a case-by-case basis, taking into account energy, environmental and economic impacts and other costs, determines is achievable for such facility . . . ."[209] New source performance standards (NSPS) and national emission standards for hazardous air pollutants (NESHAP) promulgated by EPA generally serve as the baseline for BACT determinations.[210]

For a number of years, BACT was determined on a "bottom-up" basis, roughly as follows: Starting with the baseline NSPS and any applicable

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[203] Approval and Promulgation of Implementation Plans, Kentucky: Notice of Clarification, 55 Fed. Reg. 23547 (June 11, 1990).

[204] *Id.* at 23548.

[205] To the extent interpretations are involved, those issued nonlegislatively cannot bind the courts and should be reviewed independently (subject only to the court's respectful consideration of the agency's views), rather than by a reasonableness test as suggested by EPA's language. *See* Anthony, *supra* note 5, at 36-42, 55-60.

[206] 42 U.S.C. §§7470-7479 (1988).

[207] 42 U.S.C. §§7475(a), 7479(1) (1988); 40 CFR §§52.21(i), 52.21(b)(2).

[208] 42 U.S.C §§7475(a)(4), 7479(3) (1988).

[209] 42 U.S.C. §7479(3)(1988). The definition in EPA's regulations is very similar. 40 CFR 52.21(12)(1990).

[210] 42 U.S.C. §7479(3) (1988).

NESHAP, the permitting authority weighed the statutory considerations to determine whether any higher level of control was "available" and "achievable" in the particular circumstances of the case.[211] Beginning in 1986 and 1987, units within EPA adopted and imposed on the states a "top-down" approach in place of the bottom-up method. Briefly, in place of case-by-case weighing of factors, "top-down" requires use of the most stringent control technology unless the applicant can show that it is technologically or economically "infeasible." The first comprehensive announcement of the new policy was through a 1987 memorandum from the Assistant Administrator for Air and Radiation to the EPA's Regional Administrators.[212] The Assistant Administrator stated that he had "determined that [the top-down approach] should be adopted across the board," and that a state-issued permit that "fails to reflect adequate consideration of the factors that would have been relevant using a 'top-down' type of analysis shall be considered deficient by EPA."[213] There followed in July 1988 a communication (captioned "Memorandum," but introduced by the words "this guidance") from the Associate Enforcement Counsel for Air and the Director of the Stationary Source Compliance Divisions to various subordinate regional and headquarters officials.[214] This document states that "any one of the following factors will normally be sufficient for EPA to find a [state-granted] permit 'deficient' and consider enforcement action: 1. BACT determination not using the 'top-down' approach."[215] Other documents were issued, stating in various terms the mandatory nature of the top-down requirements, which were applied consistently after 1988.[216] But these requirements were never made the subject of rulemaking procedures, or of any sort of public notice, opportunity for public comment or any other form of public participation in their development.

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[211] *See* EPA, Prevention of Significant Deterioration Workshop Manual (October 1980).

[212] Memorandum of J. Craig Potter, Assistant Administrator for Air and Radiation, to Regional Administrators, Regions I - X, December 1, 1987.

[213] *Id.* at 4.

[214] Memorandum from Michael S. Alushin, Associate Enforcement Counsel for Air, Office of Enforcement and Compliance Monitoring, and John S. Seitz, Director, Stationary Source Compliance Division, Office of Air Quality Planning and Standards, to 45 addressees, July 15, 1988.

[215] *Id.* at 2.

[216] On March 15, 1990, the Source Review Section, Noncriteria Pollutants Program Branch, Air Quality Management Division, Office of Air Quality Planning and Standards of EPA issued a document of some 76 pages plus appendices, captioned " 'Top-Down' Best Available Control Technology Guidance Document." The cover and every page were prominently marked "draft." In October 1990, EPA's Office of Air Quality Planning and Standards issued a draft New Source Review Workshop Manual, containing a 75-page chapter, the bulk of which was devoted to a detailed explanation of how the top-down process should be applied. Again, every page was marked "draft". These informal guidance documents were never put into a final form, let alone made the subject of rulemaking.

Litigation ensued, challenging EPA's promulgation of this mandatory policy without the use of legislative rulemaking.[217] In July 1991, EPA entered a settlement agreement with the plaintiffs in this group of cases.[218] Though it conceded no admissions on any issue of law, fact or liability,[219] EPA agreed to publish in the Federal Register "a proposed rule proposing to revise or clarify the regulations defining BACT . . . and proposing to revise or clarify how BACT determinations should be made,"[220] and "to take final action on the proposed rule as expeditiously as practicable."[221] The settlement further recited: "Any EPA BACT policy statement or interpretation is intended only to guide the implementation of BACT under approved state new source review programs and is not intended to create binding legal rights or obligations and does not have the force and effect of law."[222]

These actions in the Kentucky SIP matter and the top-down case bespeak some degree of recognition by EPA of an obligation to rely upon legislative rules, rather than informal documents, to establish binding standards and requirements. Interestingly, in the top-down situation EPA might have been able to avoid obligatory rulemaking, even though it intended its top-down precepts to bind private parties, by framing them as interpretive rules. The key elements of the top-down policy arguably can be linked to the language of the statutory definition of BACT.[223] As noted above, an agency is not obliged by the APA to use legislative rulemaking for promulgating documents that interpret specifically worded statutory language, even if it intends to apply the interpretations rigorously to private parties affected by them.[224] On the other hand, I believe the top-down documents are more properly viewed as policy statements, which may not be used in place of legislative rules when the agency intends them to bind. In its own brief in the litigation challenging EPA's failure to promulgate the top-down policy by legislative rulemaking, the government repeatedly characterized the top-down policies and actions as statements of policy (or administrative adjudications), rather than as interpretive rules.[225] On this view, of course, legislative rulemaking would be required to the extent the documents were intended to bind private parties.[226]

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[217] The principal case based on failure to use legislative rulemaking procedures is American Paper Institute v. Reilly, Civ. No. 89-2030 (D.D.C., filed July 18, 1989). Related cases are American Paper Institute v. Reilly, No. 89-1428 (D.C. Cir., filed July 10, 1989); Alabama Power Company v. Reilly, No. 89-1429 (D.C. Cir., filed July 11, 1991); American Paper Institute v. Reilly, No. 90-1364 (D.C.Cir., filed July 13, 1990).

[218] Settlement Agreement, dated July 9 and 10, 1991, entered in the cases cited in note 217, *supra*.

[219] *Id.* at 5.

[220] *Id.* at 2.

[221] *Id.* at 2.

[222] *Id.* at 2. The quoted passage was immediately followed by citation to the "clarification," text at notes 203-205 *supra*, of the language in the preamble to the rule approving Kentucky's revised SIP, discussed in text at notes 200-202, *supra*.

[223] *See* text at note 49, *supra*.

[224] *See* text and authorities at notes 3-5, *supra*. Portions of the top-down process might be regarded as rules of procedure or practice, exempt from notice-and-comment rulemaking requirements under 5 U.S.C. §553(b)(3)(A)(1988).

If not a separate category, rules governing ratemaking should at least be recognized as a distinct subset of the applications-and-approvals category.

B-12. A Federal Communications Commission issuance offers an intricate example in point. The Commission in 1985 opened an investigation of rates charged by local telephone companies ("LEC's) for special access services including high-capacity communications ("HiCap") services.[227] The special access services rate category primarily embraces large-scale private-line services offered by LECs to major interstate carriers such as AT&T and MCI and to large business users. Separately established rules required LECs to refund charges if their rate of return for any segment of their operations (such as special access) exceeded the allowable overall rate of return, even if the latter were within permissible limits.[228] Those rules were struck down by the District of Columbia Circuit in early 1988.[229] In December 1988, the Commission announced in the special access proceeding a set of specific new "guidelines" for evaluating the lawfulness of HiCap rates.[230] Although some comments were received, somewhat in the fashion of FCC ratemakings, §553 rulemaking procedures were not employed.[231] These guidelines established issues that differed significantly from the issues and factors announced at the outset of the proceeding.[232] Among them was one (guideline #1) that largely resuscitated, for HiCap special access rates, the refund rules struck down earlier that year.[233]

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[225] Defendants' Memorandum in Support of Motion to Dismiss, American Paper Institute v. Reilly, Civ. No. 89-2030 (D.D.C.), dated October 19, 1989, at 12, 33, 35, 36.

[226] On the fashion in which federal nonlegislative documents may bind or otherwise affect state and local permitting agencies, and through them private parties, *see* Section VII *infra*.

[227] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, released May 24, 1985 (the "Designation Order").

[228] Authorized Rates of Return for Interstate Services of AT&T Commmunications and Exchange Telephone Carriers, 50 Fed. Reg. 41,350 (1985).

[229] American Tel. & Tel. Co. v. FCC, 836 F.2d 1386 (D.C. Cir. 1988).

[230] Investigation of Special Access Tariffs of Local Exchange Carriers, 4 FCC Rcd 4797 (1988).

[231] The Commission characterized the proceedings as "Rule Makings of particular applicability." Investigation of Special Access Tariffs of Local Exchange Carriers, 5 FCC Rcd 4861, ¶ 7 (1990)(denying reconsideration).

The accompanying order directed the affected companies to file supplemental cases to justify their rates under the guidelines.[234] In a January 1990 action,[235] the Commission applied the guidelines, and found (with one exception) that the companies' HiCap rates in effect at the time satisfied the new guidelines, and therefore ordered no change in those existing rates.[236] The Commission also applied the guidelines to HiCap rates during the 1985-1986 and 1987-1988 review periods. On the basis of guideline #1, it ordered eleven companies to refund tens of millions of dollars.[237]

The companies did not seek judicial review of the failure to use legislative rulemaking to adopt the guidelines, since they were generally content with the way the guidelines were applied to uphold existing rates, which would continue into the future.[238] They have, however, challenged the refund orders on grounds of impermissible retroactivity.[239]

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[232] *See* MCI v. New York Telephone Co., 5 FCC Rcd 707, 708 ¶ 10 (1990)("The Commission * * * decided not to evaluate the specific * * * rates under investigation using the approach [announced at the outset of the proceeding] but instead established a set of guidelines").

[233] 4 FCC Rcd 4797, 4803 ¶58 #1.

[234] *Id.* at 4805, ¶ 78.

[235] Investigation of Special Access Tariffs of Local Exchange Carriers, 5 FCC Rcd 412 (1990)(the "refund order").

[236] *Id.* at 416 ¶ 32.

[237] *Id.* at 412-413 ¶¶ 6-12, 416 ¶ 34-37.

[238] Interview with Alfred Winchell Whittaker, counsel for the Ameritech telephone companies, in Washington, DC (Aug. 7, 1991).

[239] The Ohio Bell Telephone Co. et al v. FCC, No. 90-3146 (6th Cir., filed Feb. 21, 1990).

Even if one took the view that (despite the Commission's own characterization, *see* note 231 *supra)*, the proceeding was partly an adjudication because it included an investigation of past rates, the method of promulgating the guidelines probably would remain improper. The 1988 document did not merely address the past, but spoke without limitation to all LECs, for all the future: "[W]e will require that all LECs provide a *de novo* justification of their strategically-priced access rates in each annual access tariff filing. The justification should consist of a demonstration that the rates proposed will meet the standards [guidelines] set forth herein." Investigation of Special Access Tariffs of Local Exchange Carriers, 4 FCC Rcd 4797, 4803 ¶ 57 (1988). This is the language of rulemaking. That the guidelines were applied in a partly adjudicatory 1990 decision would not legitimate the failure to use rulemaking in 1988 (though their application in 1990 might be sustainable procedurally on the theory that the guidelines were freshly-generated for purposes of the adjudication, *see* N.L.R.B. v. Wyman-Gordon Co. 394 U.S. 759 (1969).) Whether application of the guidelines could be sustained over the further objection that it was impermissibly retroactive is, of course, an entirely separate matter.

C. Use of Nonlegislative Policy Documents in Benefit Cases

Nonlegislative policy issuances have been used to deny benefits in federal programs.

C-1. The Bureau of Indian Affairs denied general assistance benefits to full-blooded unassimilated Indians who lived near but not on their reservation.[240] The Supreme Court found them eligible under the statute, but assumed that in view of reduced appropriations the agency could rationally limit elibility to those actually living on the reservation. It had not succeeded in doing so, however. By issuing its restrictive eligibility policy only through a BIA manual, the "conscious choice of the Secretary not to treat this extremely significant eligibility requirement, affecting the rights of needy Indians, as a legislative-type rule, renders it ineffective * * * .[241]

C-2. The Department of Housing and Urban Development's *HUD Property Disposition Handbook, One to Four Units* governed the disposition of family residences foreclosed and transferred to HUD under its mortgage insurance programs. Homeless persons and organizations aiding the homeless attacked the document in several particulars, and challenged its validity on the ground that it had not been issued through legislative rulemaking procedures. Language in the document directed HUD's property disposition directors in the field to follow the policies and procedures therein set forth.[242]

C-3. Plaintiff claimants were denied Medicare Part B reimbursement for certain services on the basis of provisions in the Carrier's Manual, a nonlegislative document "made binding in Part B benefit determinations" by regulations issued by the Secretary of Health and Human Services.[243]

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[240] Morton v. Ruiz, 415 U.S. 199 (1974).

[241] *Id.* at 236. "The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations." *Id.* at 232.

[242] Lee v. Kemp, 731 F.Supp. 1101 (D.D.C. 1989)(remanded for violation of notice-and-comment rulemaking requirments). Although the subject matter was exempt from APA rulemaking requirements as relating to "public property," 5 U.S.C. §553(a)(2) (1988), HUD had voluntarily subjected itself to substantially the same requirements. *Id.* at 1112-1113. Such a voluntary waiver of the exemption is binding on the agency. Rodway v. USDA, 514 F.2d 809 (D.C. Cir. 1975).

[243] Linoz v. Heckler, 800 F.2d 871, 874 (9th Cir. 1986)(document held invalid). Although the subject matter was exempt from APA rulemaking requirements as relating to "benefits," 5 U.S.C. §553(a)(2), HHS in 1971 had waived the exception. *Id.* at 877 n.7. Contrast Friedrich v. Sec'y of H&HS, 894 F.2d 829 (6th Cir. 1990), holding that a "national coverage determination," on the basis of which a Part B Medicare reimbursement claim was denied, was an interpretive rule because it interpreted the statutory term "reasonable and necessary." *Id.* at 837.

C-4. The Social Security Administration's Appeals Council, relying on a Social Security Ruling that implemented a statutory amendment directing the Secretary of HHS to formulate new policy in the disability benefits program, reversed an administrative law judge's award of benefits.[244]

C-5. HHS's Medicare Provider Reimbursement Manual and a clarifying memorandum called for paying cost-control bonuses to hospitals at the final settlement stage rather than at the interim payment or tentative settlement stage.[245]

D. Nonlegislative Policy Documents Affecting Programs Administered by the States

Standards in nonlegislative federal issuances often control the disbursement of federally-reimbursed moneys to or by the states, or the conduct of programs administered by the states. "The manner in which the Secretary regulates the states controls the manner in which the states regulate the facilities and that, in turn, controls the treatment of the residents."[246]

D-1. The Department of Labor issued an Unemployment Insurance Program Letter, establishing detailed rules with mathematical formulas for determining individual contributions to pension funds, for the states to include when exercising authority under the Federal Unemployment Tax Act to provide in their respective laws for taking account of pension contributions in computing benefits.[247]

D-2. Class action plaintiffs were threatened with reduction in food stamps under Agriculture Department interim rules, issued without notice or opportunity for comment, that implemented a statutory change in the definition of "household."[248]

D-3. The Department of Labor, by notification to regional offices, established a new method of calculating the unemployment statistics by which were triggered the emergency job program allocations to the states under the Comprehensive Employment and Training Act.[249]

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[244] W.C. v. Bowen, 807 F.2d 1502 (9th Cir. 1987)(Ruling held void; ALJ award of benefits reinstated).

[245] Mt. Diablo Hospital Dist. v. Bowen, 860 F.2d 951 (9th Cir. 1988)(manual provision and memorandum held invalid; policy that excludes bonuses from being paid at tentative settlement was a change that must be promulgated according to APA §553).

[246] Estate of Smith v. Bowen, 675 F.Supp. 586, 589 (D.Colo. 1987).

[247] Cabais v. Egger, 690 F.2d 234, 239 (D.C. Cir. 1982)(document can be enjoined; "These rules * * * impose an obligation on the states not found in the statute itself. It cannot reasonably be argued that these rules are merely interpretative").

[248] Levesque v. Block, 723 F.2d 175 (1st Cir. 1983)(opinion by McGowan, J., sitting by designation)(interim rule invalid, though later regulations legislatively promulgated were valid).

D-4. An amended HHS regulation promulgated without notice and comment was used to deny Ohio's proposed amendment to its Medicaid State Plan, with respect to the ceiling on allocations for the maintenance and support of noninstitutionalized spouses of institutionalized Medicaid recipients.[250]

D-5. Forms, standards, methods and procedures required to be used by state survey agencies in Medicaid facility certifications were set forth for comment as appendices to the proposed regulations but were not included in the final regulations.[251]

D-6. To implement a 1981 amendment to the Trade Act of 1974, the Department of Labor issued a series of interpretive letters directing the states to calculate workers' eligibility for trade adjustment allowances in a certain fashion, and threatened to impose penalties on a state that refused to follow them.[252]

D-7. The Department of Education employs "Dear Colleague Letters" to direct compliance by state-based guarantor organizations[253] and lenders with the Department's policies for the Guaranteed Student Loan Program. The "Dear Colleague" letters sometimes purport to interpret statutory or regulatory language, but often add wholly new requirements. The Department can withhold the reimbursement of funds to lending institutions and to guarantor organizations that do not exert the efforts to collect defaulted loans stipulated in the letters.

One such document[254] outlined the conditions under which the agency will reinstate reinsurance coverage after a lending institution has violated the federal due diligence or timely filing regulations. These conditions include requirements that go beyond the statutory and regulatory language.[255] For example, the bulletin's entirely new section on "Cures for Timely Filing Violations and Certain Due Diligence Violations"[256] adds four additional steps and 75 days to the due diligence procedures outlined in the regulations. The bulletin then specifies penalties for noncompliance with the due diligence requirements, including the loss of "reinsurance payments on a loan on which the lender has violated the Federal due diligence or timely filing requirements, even if the lender has followed a cure procedure established by the [guarantor] agency."[257] Although the regulations do not provide that the Department may withhold payment of accrued interest as a penalty for a lender's violation,[258] the bulletin adds this penalty for due diligence violations occurring on or after May 1, 1988.[259] In addition, the regulation relevant to skip tracing[260] has been expanded in the bulletin to require location of the borrower and performance of an additional due diligence stream before a claim is filed.[261]

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[249] Batterton v. Marshall, 648 F.2d 694 (D.C. Cir. 1980)(Maryland's claims held justiciable only regarding changes in methodology for the future; held that those changes must be promulgated by APA legislative rulemaking procedures).

[250] Ohio Dep't of Human Services v. HHS, 862 F.2d 1228 (6th Cir. 1988)(rule held invalid).

[251] Estate of Smith v. Bowen, 675 F.Supp. 586 (D.Colo. 1987)(held Secretary in contempt of prior District and Circuit court orders to promulgate regulations on the subject).

[252] Tyler v. Dep't of Labor, 752 F.Supp. 32 (D.Me. 1990)(held the eligibility policy invalid).

[253] State-based guarantor organizations may be agencies of the state, public nonprofit corporations or private nonprofit corporations. These organizations are ordinarily referred to as "guaranty agencies." The term "agency" is not so used here, to avoid confusion with the federal agency.

[254] Uncaptioned letter from C. Ronald Kimberling, Assistant Secretary for Postsecondary Education, and Dewey L. Newman, Deputy Assistant Secretary for Student Financial Assistance, to state guarantor organization directors (Mar. 11, 1988)(herein called the "Cure Bulletin" or "the bulletin").

V. The Key Test: Intent to Bind or Binding Effect

Though they do not express it in just the same language, the illustrative judicial decisions cited in the last section support this simple proposition: *If a document expresses a change in substantive law or policy*[262] *(other than an*

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[255] The letter cites 34 CFR 682.406(a)(3), (a)(5) and 34 CFR 682.423(b)(1) as the foundation for requiring the lender to comply with the minimum due diligence procedures and with the timely filing deadlines in order for the guarantor organization to receive reinsurance on the loan. But it is the March 11, 1988 Bulletin that delineates the actual situations that can jeopardize the institutions' right to receive or retain interest benefits and special allowance payments on a loan.

[256] Cure Bulletin, Section I.E.1.a., p. 9-10.

[257] Cure Bulletin, p. 2.

[258] 34 CFR 682.413 (1990).

[259] Cure Bulletin, Section I.C.2.b., p. 8.

[260] 34 CFR 682.411(g) (1990).

[261] Cure Bulletin, Section I.E.1.a., p. 9-10.

[262] Numerous cases identify the class of changes that are subject to legislative rulemaking requirements in terms like "impos[ing] rights and obligations," Community Nutrition Institute v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987)(quoting American Bus Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980)); "modifies existing rights, law, or policy," W.C. v. Bowen, 807 F.2d 1502, 1504 (9th Cir. 1987); "*effect a change* in existing law or policy," Mt. Diablo Hospital Dist. v. Bowen, 860 F.2d 951, 956 (9th Cir. 1988)(quoting Linoz v. Heckler, 800 F.2d 871, 877 (9th Cir. 1986)(emphasis in original); "substantially alter the rights or interests of regulated parties," Air Transport Ass'n of America v. Dep't of Transportation, 900 F.2d 369, 376 (D.C. Cir. 1990)(quoting American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1041 (D.C.

interpretation) which the agency intends to make binding, or administers with binding effect, the agency must observe the APA's legislative rulemaking procedures.[263] The legislative rulemaking process must be utilized if the document is to have the binding effect the agency intends.

These cases reflect a realization that the agency should not be able to fasten its will upon the affected public through any means it pleases. It may not tell people what they can and cannot do except through procedures that Congress by delegation has empowered them to use for making law.[264] It may not enforce or apply a nonlegislative policy document in just the same way it may enforce or apply a legislative rule.[265] Especially in view of the important values served by legislative rulemaking--enrichment of the agency's information and enhancement of the rule's acceptability, flowing from the public's opportunity to present facts and views--can it credibly be argued that unilaterally-issued guidances or memoranda can possess the same force? Congress in the APA has said they cannot.[266]

In one way or another, almost all of these exemplar cases mentioned the agency's intent to bind affected parties, or a binding effect as administered, as a ground for disapproving the nonlegislative policy document.

Here are samples from the decisions citing agency *intent to bind:* "We find this evidence persuasive that the Park Service intended the Lafayette Park storage rule as an independent substantive rule."[267] "EPA is attempting to impose the Rhoads memo upon Zimmer as a presently binding rule."[268] "The fundamental question * * * is whether or not the Compliance Office of the Division of Compliance Programs of the FDA may properly insist upon

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Cir. 1987)). *See also* Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979)(a "substantive rule" or "legislative-type rule" is one "affecting individual rights and obligations").

[263] This proposition does not apply to documents that interpret concrete statutory or regulatory language. *See* notes 3-5 *supra.* The theory is that the agency is not making new law or changing the law but is merely clarifying or explaining already-existing law in the statutes or regulations. *See* American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1045-1046 (D.C. Cir. 1987).

[264] *See* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 34-40 (1990).

[265] Even principles announced through adjudication, which may have the force of law at least as to the parties, *see* Anthony, *supra* note 265, at 47-52, should not be treated "precisely as if they were rules." Resolution of American Bar Ass'n House of Delegates, *reprinted in* Richard K. Berg, *Re-Examining Policy Procedures: Rulemaking and Adjudication*, 38 Admin. L. Rev. 149, at 177 (1986).

[266] 5 U.S.C. §553 (1988).

[267] United States v. Picciotto, 875 F.2d 345, 347 (D.C. Cir. 1989).

[268] United States v. Zimmer Paper Products, Inc., 20 E.L.R. 20556, 20558 (S.D. Ind. 1989).

manufacturers of plated culture media meeting an SAL [sterility assurance level, established by draft inspectional guidelines] of 0.1%. It may not do so."[269] . "Because [OSHA] possesses legislatively delegated power to make legislative rules and because it is apparent to us that [OSHA] must have intended this regulation to be an exercise of that power, we hold that the walkaround pay regulation is a legislative rule."[270] "Moreover, the effect of the new regulation exposes the Administration's true intent. [footnote:] Courts often infer the intent behind an action from the action's foreseeable effects."[271] "Here, the language of the statement and related comments establish that more is involved than mere 'interpretation,' because the proposed statement has the clear intent of eliminating a former exemption and of providing the Commission with power to enforce violations of a new rule."[272] "Order No. 362 adopts a substantive rule imposing such rights and obligations."[273] "The agency's own words strongly suggest that action levels are not musings about what the FDA might do in the future but rather that they set a precise level of aflatoxin contamination that FDA has presently deemed permissible. Action levels inform food producers what that is; indeed, that is their very purpose."[274] An agency contention that its guidelines "are not intended to prejudge any individual application" was rejected with the observation that "there are sinews of command beneath the velvet words of the subsequent sections of the guidelines."[275]

"In short, the essential inquiry is what the agency intends to do, for if it chooses to exercise its legislative rulemaking power, then that is what it has done."[276] "[I]n this case it is clear that Brigadier General Kelly's Memorandum affected a change in Corps policy intended to have the full force and effect of a substantive rule, and that the Corps relied on the memorandum in reaching its jurisdiction determination."[277] "When the agency states that in subsequent proceedings it will thoroughly consider not only the policy's applicability to the facts of a given case but also the underlying validity of the policy itself, then the agency intends to treat the order as a general statement of policy."[278] "The district court found that [the Bellmon Amendment review program] was designed to alter ALJ decisions."[279] "[S]ubstantial impact does not make a rule legislative, but whether a rule has a substantial impact may be relevant in construing the intent of the agency in issuing the rule. In this case, there is a great deal of evidence * * * to suggest that the Secretary fully intended this rule to have legislative effect."[280] "This legislative and regulatory framework heavily supports the conclusion that the Secretary intended the new regulations to have the force of legislative rules."[281] "[T]he legislative and regulatory framework suggests that the Secretary, at the time of their promulgation, intended the regulations to have legislative effect."[282] "The perceived need for 'exemptions' reinforced our understanding that the FDA had intended the action levels to have a binding effect."[283]

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[269] United States v. Bioclinical Systems, Inc., 666 F.Supp. 82, 83 (D. Md. 1987).

[270] Chamber of Commerce of the U.S. v. OSHA, 636 F.2d 464, 468 (D.C. Cir. 1980).

[271] *Id.* at 469 & n.7.

[272] Jerri's Ceramic Arts v. CPSC, 874 F.2d 205, 208 (4th Cir. 1989).

[273] Texaco, Inc. v. FPC, 412 F.2d 740, 744 (3rd Cir. 1969).

[274] Community Nutrition Institute v. Young 818 F.2d 943, 948 (D.C. Cir. 1987).

[275] American Trucking Ass'n v. ICC, 659 F.2d 452, 463 (5th Cir. 1981).

[276] American Trucking Ass'n v. United States, 688 F.2d 1337, 1344 (11th Cir. 1982).

[277] Tabb Lakes, Ltd. v. United States, 715 F.Supp. 726, 728 (E.D. Va. 1988).

[278] Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 39 (D.C. Cir. 1974).

Numerous other opinions, beyond those in cases cited as illustrations above, show the centrality of the agency's intent to bind. Here are a few: "[S]tatements whose language, context and application suggest an intent to bind agency discretion and private party conduct--the sort of statements requiring compliance with §553--will have that effect if valid; interpretive rules or policy statements will not, *regardless* of their validity. A binding policy is an oxymoron."[284] "When it added the District to its exemption regulation the Commission clearly intended to exercise that authority and promulgate a rule with the full force of law."[285] "To detemine the effect of a *Manual* provision, a court must determine the Commission's intent in authoring it."[286] "[I]f by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule."[287]

In the following cases, drawn from those cited as illustrations above, the court's opinion identified the nonlegislative policy document's *binding effect* as an indicium that legislative rulemaking should have been used: "Our limited holding is that the current action levels are treated as substantive rules by FDA and, as such, can only be permitted if notice-and-comment procedures are employed."[288] "Notwithstanding FDA's unsupported protestations to the contrary, it is apparent that Import Alert #66-14 binds not only the agency, but the importers as well."[289] "More critically than EPA's language adopting the model, its later conduct applying it confirms its binding character. * * * . The agency treated the model as disposing conclusively of certain issues."[290] "The rule imposed a ceiling *ex proprio vigore*. The rule was mandatory, not advisory, and the mandate was a new one."[291] "Although the Program Statement provides that inmates 'will be expected' to allot 50% of their earnings to the payment process, this 'expectation' has been given the force of law. * * * . Program Statement 5380.1 has been itself interpreted by the defendants as an absolute rule."[292] "These rules limit state discretion in this area and impose an obligation on the states not found in the statute itself."[293] "[A]t oral argument, agency counsel stated categorically that the handbook definition is mandatory, binding Department policy, not simply a factor to guide the discretion of regional administrators."[294] "The critical question is whether the agency action jeopardizes the rights and interests of the parties, for if it does, it must be subject to public comment prior to taking effect."[295] "[A] legislative rule is recognizable by virtue of its binding effect."[296]

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[279] W. C. v. Bowen, 807 F.2d 1502, 1505 (9th Cir. 1987).

[280] Levesque v. Block, 723 F.2d 175, 182-183 (1st Cir. 1983)(per McGowan, J., sitting by designation).

[281] *Id.* at 183.

[282] Tyler v. Dep't of Labor, 752 F.Supp. 32, 38 (D. Me. 1990)(citing Levesque v. Block, 723 F.2d 175 at 182 (1st Cir. 1983)).

[283] Alaska v. Dep't of Transportation, 868 F.2d 441, 446 (D.C. Cir. 1989)(citing Community Nutrition Institute v. Young, 818 F.2d 943, 947 (D.C. Cir. 1987)).

[284] Vietnam Veterans of America v. Sec'y of the Navy, 843 F.2d 528, 537 (D.C. Cir. 1988)(per S. Williams, J.)(emphasis in the original).

[285] Joseph v. Civil Service Comm'n, 554 F.2d 1140, 1153 (D.C. Cir. 1977).

[286] Doe v. Hampton, 566 F.2d 265, 281 (D.C. Cir. 1977).

[287] General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984).

From words like those just quoted, and even more from their holdings, the cases exhibit a virtual unanimity in condemning the use of nonlegislative documents (other than interpretations) that are intended to bind, or that do bind, in practical terms.[297]

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[288] Community Nutrition Institute v. Young, 818 F.2d 943, 949 (D.C. Cir. 1987).

[289] Bellarno Int'l Ltd. v. FDA, 678 F.Supp. 410 (E.D. N.Y. 1988).

[290] McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1321 (D.C. Cir. 1988).

[291] Ohio Dep't of Human Services v. Dep't of HHS, 862 F.2d 1228, 1234 (6th Cir. 1988).

[292] Prows v. U.S. Dep't of Justice, 704 F.Supp. 272, 276 (D.D.C. 1988).

[293] Cabais v. Egger, 690 F.2d 234, 239 (D.C. Cir. 1982).

[294] Comite de Apoyo para los Trabajadores v. Dole, 731 F.Supp. 541, 545 (D.D.C. 1990).

[295] Batterton v. Marshall, 648 F.2d 694, 708 (D.C. Cir. 1980).

[296] Alaska v. U.S. Dep't of Justice, 868 F.2d 441, 445 (D.C. Cir. 1989). Despite its language rejecting the argument that an agency's action is legislative whenever it has the effect of creating new duties, Fertilizer Institute v. EPA, 935 F.2d 1303, 1308 (D.C. Cir. 1991) is not contrary to the above cases, since the rule in question there was interpretive.

[297] A possible exception is Friedrich v. Sec'y of HHS, 894 F.2d 829 (6th Cir. 1990). The court recognized the binding character of the Medicare national coverage determination ("The Secretary has chosen to seek uniformity by requiring Part B carriers to abide by all regulations in the Manual," *Id.* at 837), but treated the Secretary's determination as an interpretation of the statutory language "reasonable and necessary," which therefore "creates no new law." *Ibid.* Certainly, the classification as intepretive is fairly arguable either way.

VI. The Role of Agency Discretion

As a gauge of whether an agency should have issued a policy document legislatively, the courts have made much of the discretion reserved by the agency. Certainly there is a major role for this element of the analysis, but in many cases it should not be determinative.

In his important *McLouth Steel* opinion, Judge Stephen Williams succinctly stated the test distilled from numerous D.C. Circuit opinions: "The question for purposes of §553 is whether a statement is a rule of present binding effect; the answer depends on whether the statement constrains the agency's discretion."[298]

The point of this approach is that, if the agency has acted *tentatively*, and reserves discretion to reconsider and to revise or vary or rescind the policy before concretely applying it, then neither the agency nor an affected private party is bound, either as a legal matter or in a practical sense. On this basis, an agency would not err in announcing its policy through a nonlegislative document.

These conclusions must rest, however, on the assumption that, *before applying the policy concretely to a private party*, the agency either will promulgate it as a legislative rule or will hold its mind open to reconsider the policy and accord the affected party an opportunity to challenge its wisdom.[299]

One difficulty is that this assumption is not made explicit in the cases. Another is that this assumption may be unfulfilled in particular cases. As in many of the illustrative cases mentioned above, the agency well may have settled firmly upon its policies, with every intent of exacting conformity from those affected. The fact that the policy is announced in a nonlegislative document--and speaks of reserved discretion to act at variance with it--does not change that intent. But under the D.C. Circuit's test, this tactic simply furnishes the agency a convenient chance to have things both ways: to impose a practical binding effect upon private parties, but also plausibly to argue to the courts that the informal issuance and reserved discretion prove there was no obligation to proceed legislatively. This strategy may through bureaucratic habit be pursued in the best of faith. But in reviewing the cases one cannot avoid the suspicion that the agencies consider it easy to fool the courts on these points, or at least think it is worth arguing in the face of manifest reality that their reservation of discretion means that they have not bound the complaining members of the public.

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[298] McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1320 (D.C. Cir. 1988). The discretion considered here appears to be discretion to act at variance with positions set forth in the document. Perhaps distinct is the discretion as to substance connoted when the Eleventh Circuit remarked that "the fact that the prospective announcement affects a discretionary function does not deprive it of its rulemaking quality." American Trucking Ass'n, Inc. v. United States, 688 F.2d 1337, 1348 (11th Cir. 1982).

[299] "[A]n agency's open-mindedness in individual proceedings can substitute for a general rulemaking." *Id.* at 1325. The agency may say what it is *thinking of* doing. That is a policy statement. But when it *knows* what it is going to do, it must use legislative rulemaking.

Citing *McLouth*, the same Circuit in a related context spoke of a "presumption of closed-mindedness." Air Transport Ass'n of America v. Dep't of Transportation, 900 F.2d 369, 390 (D.C. Cir. 1990)(*per* Edwards, J.).

In fact, despite any professed reservation of discretion, a nonlegislative document as a practical matter can quite readily impose binding standards or obligations upon private parties. Their discretion is constrained even if the agency's is not. A test more in the spirit of the APA than looking to the constraints on the agency's discretion would be to consider whether the intended or actual constraints on the *private persons' discretion* (that is, upon their freedom of action) amount to binding them in a practical sense. If so, the recitation that discretion is reserved should be of no moment, and the agency's circumvention of legislative rulemaking procedures should be redressed.

These points may be illustrated by the following form of disclaimer, which EPA prepared in the summer of 1991 for inclusion in guidances and other nonlegislative issuances.[300]

> NOTICE: The policies set out in this [document] are not final agency action, but are intended solely as guidance. They are not intended, nor can they be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials may decide to follow the guidance provided in this [document] or to act at variance with the guidance, based on an analysis of site-specific circumstances. The Agency also reserves the right to change this guidance at any time without public notice.

It scarcely needs to be observed that this provision is wholly one-sided. The substantive elements in EPA guidance documents are often couched in specific and facially mandatory terms, by which affected private parties may reasonably believe themselves to be bound in one of the practical senses described above.[301] The quoted EPA statement preserves great discretion for the agency. But it yields no flexibility to affected persons, nor does it afford any assurance that they will have a realistic chance to challenge the substantive policy positions set forth in the document.

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[300] Interview with E. Donald Elliott, General Counsel, and Charles L. Elkins, Associate General Counsel, Environmental Protection Agency, in Washington, DC (July 10, 1991).

[301] Part III, *supra*.

The literal application of the D.C. Circuit's discretion test would exculpate the use of nonlegislative procedures for a document endorsed with this disclaimer. And yet if the document is binding as a practical matter--because it is framed in mandatory terms or is regularly applied or is so structured that in context affected persons cannot disregard it--it would seem quite wrong to hold that such a disclaimer excuses the failure to observe notice-and-comment requirements.

To do so in such a case would leave the private party in the worst of possible worlds: The private party is bound but the agency retains full freedom to act at variance with its stated position. The reservation of discretion affords the agency scope for unpredictable behavior, without diminishing the prospective compliance burden on the private party. Alternatively, there is little to deter the agency, despite its reservation of discretion to decide variantly, from relentlessly applying the stated positions as though they had the full force of law.

Under the corollary to the D.C. Circuit's position--that the more discretion the agency reserves the less likely it is that the rule will be treated as legislative--the agency is rewarded for stating its rules with less precision and authority than it might otherwise have to do. And yet as a practical matter it still may be able to apply or threaten to apply the rule in a binding way. It is bad government to tolerate the notion that the more discretion an agency reserves the more readily it can escape the obligations of promulgating its rules in the manner Congress has instructed it to do.

Only if the agency makes it clear that it retains an open mind on the final terms of the policy should the fact that it retains discretion validate its use of nonlegislative guidance documents. If the mind is open, the affected party's opportunity at a later proceeding to contend for an alternative or modified policy, or for abandonment of the tentatively adopted one, is the functional equivalent of the opportunity to comment in a legislative rulemaking proceeding.

Thus, an agency may issue a statement of policy setting forth the standards it expects to apply in granting certain approvals. If the agency genuinely maintains an open mind, so that an applicant has a realistic chance to persuade it to adopt a different position when the applicant's particular case is passed upon, the original policy statement had neither the intent nor the effect of imposing mandatory constraints on the applicant. The agency therefore was not obliged to use legislative rulemaking procedures to issue it.[302]

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[302] "When the agency states that in subsequent proceedings it will thoroughly consider not only the policy's applicability to the facts of a given case but also the underlying validity of the policy itself, then the agency intends to treat the order [which in FPC parlance can be a rule] as a

Similarly, if an agency administering a vague statute sets forth a guidance as to the kinds of behavior it will take enforcement action against, but persons guilty of that behavior have a real opportunity when proceeded against to persuade the agency that that behavior should not be deemed culpable, the guidance may be issued without observing legislative rulemaking procedure, since it has neither the intent nor the effect of foreclosing the private party.

But if the outcome of the later proceeding is a foregone conclusion because the earlier policy statement or guidance was to be mechanically applied, clearly there has been an intent or an effect making it binding on the private parties as a practical matter, and legislative rulemaking should have been used.[303]

The announced position might be mechanically applied because the agency decisionmakers intended all along to apply it that way. But it also might be mechanically applied because staff or administrative law judges or cooperating state officials felt obliged to follow strictly the document that came from headquarters, even if the agency heads had not intended that those officials be obliged to follow it. Thus the agency would be well advised to establish a system to prevent the inadvertent closing of minds it intends to be kept open. Elements of such a system for assuring that policies are tentative are proposed in the Recommendations section of this Article.

If the agency genuinely has put its document forth on a tentative basis and with an open mind, it should welcome the discipline needed to assure that its intent is effectuated. But when an agency in practice withholds realistic opportunities to challenge its purportedly tentative policies, or conceals the availability of such opportunities, or issues documents in a way that leaves ambivalence or confusion about their legal effect, or plays cute with a low-profile issuance of a document it intends to be binding, its claim to exemption from the APA's rulemaking requirements is to that extent vitiated. It should not be suffered to come into court and plead, as agencies so often have done,

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general statement of policy [within the exemption of APA §553(b)(A)]." Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 39 (D.C. Cir. 1974).

To be treated as having an open mind, it should not be enough that the agency permits affected persons to seek waivers or exceptions from the stated position. A Commission having "elected to proceed in this case by making a general rule," Texaco, Inc. v. FPC, 412 F.2d 740, 745 (3rd Cir. 1969), [w]e believe that Texaco is harmed by being faced with such a general rule which it must overcome in any ad hoc waiver proceeding * * * . In filing a waiver application, an operator is entitled to be confronted only with rules adopted in the procedural manner prescribed by Congress." *Id.* at 746.

[303] "Had petitioner seriously attacked the reasoning of the Policy Statement, and had ERA responded merely by saying, in effect, 'That is no longer open to discussion. We resolved it in the Policy Statement,' then the agency's conduct would belie its characterization of the Policy Statement." Panhandle Producers and Royalty Owners Ass'n v. Economic Regulatory Administration, 822 F.2d 1105, 1110 (D.C. Cir. 1987).

that the uncertainties with which it has surrounded the document establish its tentative effect and therefore excuse the failure to obey the rulemaking commands of the APA.

VII. Administration of Policies by Agency Staff and by the States

A. Administration of Nonlegislative Policy Documents by Agency Staff

General knowledge of normal bureaucratic behavior permits us to postulate a basic general proposition about how nonlegislative guidance documents are administered by the agencies' own staffs, especially in the field: Staff members acting upon matters to which the guidance documents pertain will routinely and indeed automatically apply those documents, rather than considering their policy afresh before deciding whether to apply them. Staffers generally will not feel free to question the stated policies, or will not in practice do so.

Staff members, including the most conscientious, have every incentive to act in this fashion. To accept the agency guidance as conclusive is the quick and simple thing to do, and leaves the staff member relatively invulnerable to criticism. By contrast, to treat the document as tentative, and therefore as subject to reconsideration upon the request of affected parties, would demand more time and effort, and would expose the staff member to disapproval for departing from established positions. And treating the matter as a settled part of the operational routine is more comfortable for the staff member than having to consider the policy anew each time it is to be applied.

Circumstances of course vary in our complicated government. Some nonlegislative policy documents may be framed in general language that is not capable of regularized application, and some may make it clear that the guidance is tentative only. But otherwise, I suspect that the above observations hold true in the great majority of cases. And I suspect that they hold true whether or not the agency[304] intended to document to bind the staff.[305]

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[304] Although judicial opinions customarily observe the polite fiction of dealing with a rule as though it had been issued by "the Secretary" or "the Administrator" or "the Commission," in reality (as shown by numerous examples in Section IV above) nonlegislative documents often--I would think usually--emanate from officials below the level of the agency heads. To announce policies nonlegislatively, those officials do not ordinarily need a delegation of authority from the agency heads, as they would if the policies were to be issued legislatively. But there is no reason

Indeed, though the agency may protest otherwise, it can often be quite clear that the nonlegislative document was intended to control the staff's basis for decision.[306] But even if the document was intended merely to guide, the tendencies mentioned are likely to harden it into a rigidly applied rule, with the effect of binding private parties.[307]

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to think that nonlegislative statements issued by lesser officials are applied by subordinates any less regularly than are nonlegislative issuances from the top.

[305] The Administrative Conference's rulemaking manual distinguishes among documents that (by intent or effect) bind (1) lower-level staff, (2) members of the public and (3) the agency itself, and accurately adds: "Any form of binding effect will take an agency pronouncement out of the policy statement exemption because policy statements are to have prospective and not immediate effect." Office of the Chairman, Administrative Conference of the United States, A Guide to Federal Agency Rulemaking 65 (2nd ed. 1991).

[306] *See, e.g.*, Morton v. Ruiz, 415 U.S. 199, 233-35 (1974) (BIA); Lee v. Kemp, 731 F.Supp. 1101, 1113-14 (D.D.C. 1989)(HUD); Tabb Lakes v. United States, 715 F.Supp. 726, 728-29 (E.D. Va. 1988)(Corps of Engineers); United States v. Bioclinical Systems, 666 F.Supp. 82, 83-84 (D. Md. 1987) (FDA); Example A-10, text at notes 135-146 *supra* (USDA inspection manuals); Example B-6, text at notes 178-183 *supra* (MSHA inspection manuals); Fugere v. Derwinski, 119 Daily Washington Law Reporter (Feb. 11, 1991) 289, 294 (U.S. Ct. Vets. Apps. Dec. 27, 1990)(rejecting agency argument that the provision's placement in a "procedural manual for the use of field personnel" prevented it from being a "substantive rule").

[307] The spokesman to whom I was directed by EPA (Walter Mugdan, Deputy Regional Counsel, Region II) stated that there are a number of circumstances in which EPA's staff permit writers may depart from guidance documents. The permit writers may not disregard the guidance, but may deem an exception appropriate where the guidance makes no sense in a given application, where its applicability is doubtful, or where the guidance is cast in flexible terms such that the permit writer must decide what a concept (like "best available control technology") means in a given application. But the permit writer cannot change basic policy, for example by allowing use of a lesser technology in place of the "best" on a nontechnical ground such as saving jobs. Nor can the permit writer ignore a methodology mandated by a guidance, such as use of the "top-down" method for determining best available control technology (*see* notes 212-216 and accompanying text *supra*). Where the guidance is cast in directive language, the staff will follow it faithfully. There is, however, some flexibility in most EPA guidances. The spokesman noted that many EPA draft permits are subject to public comment, which supplies an opportunity for challenge to relevant guidances and affords a procedure functionally similar to the notice-and-comment procedure of APA §553. Telephone interview with Walter Mugdan, Deputy Regional Counsel, Region II, EPA, New York, NY (Aug. 14, 1991). Nothing in the EPA manuals for permit writers requires them to treat guidance documents as tentative or to maintain a willingness to reconsider the policies if challenged. Telephone interview with Charles L. Elkins, Associate General Counsel, EPA, Washington, DC (Nov. 25, 1991).

The EPA's Judicial Officer, who hears appeals in the Adminimstrator's stead, has occasionally rejected or departed from the agency's guidances. *Id.* An example is In the Matter of Hoechst Celanese Corp., RCRA Appeal No. 87-13 (1989). The Judicial Officer held that the guidance documents were not mandatory and that the EPA regional office must justify its action on its own merits.

B. Administration of Nonlegislative Policy Documents by the States

The ways federal and state administrative actions interplay are many, and the span of fields that their interplay touches is broad. It reaches housing, social security, education, environmental protection, conservation, medicare, transfer programs like food stamps and unemployment compensation, and a myriad of others. The role played by federal guidance documents in so cluttered an arena cannot be comprehensively dealt with here.[308]

But a brief look at one document strikingly illustrates the way in which nonlegislative federal guidelines can be translated into commands *to* the states and then into commands *by* the states to private parties.

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[308] The most significant pattern of interaction involves federal agency insistence upon observance of the nonlegislative document as a condition of flowing money to the states, or through the states to private parties. *See, e.g.*, Cabais v. Egger, 690 F.2d 234, 235-36 (D.C. Cir. 1982) ("Unemployment insurance in this nation is a joint federal-state responsibility. * * * . The Department of Labor informs state agencies of the minimum federal requirements they must meet to remain certified primarily by issuing Unemployment Insurance Program Letters"); Ohio Dep't of Human Services v. HHS, 862 F.2d 1228 (6th Cir. 1988); Batterton v. Marshall, 648 F.2d 694 (D.C. Cir. 1980); Example D-7, text at notes 253-261 *supra* (guaranteed student loan program); Food Stamp Policy Memo 90-6, discussed in note *366 infra*. *See also* Tyler v. U.S. Dep't of Labor, 752 F.Supp. 32 (D. Me. 1990); Levesque v. Block, 723 F.2d 175 (1st Cir. 1983).

Fletcher v. Housing Authority of Louisville, 491 F.2d 793, 799 (6th Cir. 1974) offers a sample of this interaction: "HUD argues that its Circular merely suggested that local housing agencies consider implementing a rent range scheme. For us to accept this argument as a reason for not reviewing HAL's [Housing Authoity of Louisville's] rent range formula would be to blind ourselves to the realities of cooperative federalism in this case. The record is clear that the sole reason for HAL's implementation of HUD Circular No. 7465.12 was the desire to conform to HUD's wishes. HUD's desire may not have taken the form of a formal requirement * * * . But it took the form of a demand through HUD's controls over HAL's federal funding. * * * . [I]t is clear that HUD's actions made Circular No. 7465.12 a matter of federal policy, not federal suggestion."

Other significant categories of federal-state interaction in which federal nonlegislative documents play a role include those where financial conditions are not central to the issue arising under the state's administration of the federal statutory program, *e.g.*, Example B-10, text at notes 200-205 *supra* (Kentucky state implementation plan under Clean Air Act), Example B-11, text at notes 212-216 *supra* (state-granted permits to be invalidated by EPA if state fails to use "top-down" method of determining best available control technology); those in which federal liabilities are placed upon the state as an actor or upon the relevant state officials in their personal capacities, *see* discussion of the restrictions on harvesting of timber near habitats of northern spotted owls, text at notes 309-340 *infra*; and those in which the states adopt the federal guidance into their own law. *See id.*

That document is a typewritten set of guidelines issued by a regional office of the Fish and Wildlife Service, which administers the Endangered Species Act.[309] The guidelines[310] aim at protecting the northern spotted owl by restricting the cutting of timber in the vicinity of its habitat.[311] This species of owl, which is found only in Washington, Oregon and California, was listed as a "threatened species" effective July 23, 1990,[312] and the Guidelines were announced that month by F&WS's regional office in Portland, Oregon.

A species is "endangered" when it is "in danger of extinction throughout all or a significant portion of its range,"[313] and is "threatened" when it is "likely to become an endangered species within the foreseeable future."[314] 16 U.S.C. §1532(20)(1988). It is unlawful to "take" any creature listed as an endangered species.[315] In a bold application of the authorizing statute,[316] Interior has provided by regulation that all prohibitions pertaining to endangered species shall apply to all threatened species.[317] Thus, "taking" a threatened species like the spotted owl is subject to the same sanctions as is taking an endangered species. These include civil penalties, criminal fines and imprisonment, and federal and citizen suits for injunctive relief.[318]

The listing of the northern spotted owl as a threatened species immediately placed logging companies, acting in the normal course of their business on private lands, at risk of prosecution for injury to an owl or to its habitat. The extent to which unintentional injury to a bird or disturbance of habitat amounts to a "taking" is highly unclear.[319] The term "take" includes "harm,"[320] which is defined by regulation to "include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[321] In the absence of designation of a "critical habitat" pursuant to an elaborate statutory procedure,[322] no other statutory or regulatory provision expressly prohibits habitat modification. Modification that results in impairment of essential behavior patterns that could lead to extinction may be treated as "harm," even if the extinction might not occur for several decades.[323] Beyond that, one cannot confidently state the extent to which the prohibition of "take" may require maintenance of habitat necessary for essential behavioral patterns. The owl Guidelines bear upon this uncertain area.

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[309] Endangered Species Act of 1973, as amended, 16 U.S.C. §§15331-1544 (1988).

[310] U.S. Fish and Wildlife Service, Region 1, Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl (July 1990)(herein "the Guidelines").

[311] The statute provides specifically that "section 553 of title 5, United States Code (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this Act," 16 U.S.C. §1533(b)(4) (1988), with a single exception requiring *more* elaborate notice-and-comment procedures for certain actions, including the listing of a species as endangered or threatened. 16 U.S.C. §1533 (b)(4-6) (1988). The Guidelines were issued without observing these procedures.

[312] Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (June 26, 1990)(to be codified at 50 CFR §17.11).

[313] 16 U.S.C. §1532(6) (1988).

[314] 16 U.S.C. §1532(20) (1988).

[315] 16 U.S.C. §1538(a)(1)(B) (1988).

[316] "The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1) [16 U.S.C. §1538(a)(1)," which includes to "take," 16 U.S.C. §1538(a)(1)(B) (1988). 16 U.S.C. §1533(d) (1988).

[317] 50 CFR §17.31 (1990). There are some exceptions, not pertinent here.

[318] 16 U.S.C. §1540(a),(b),(e)(6),(g) (1988).

The Guidelines were intended, at least in part, to advise timber operators about what they could safely do.[324] The document can be viewed in this aspect as a safe harbor rule.[325] But it also discloses an intent to bind affected parties by authoritatively defining the offense[326]--that is, not only to set safe harbor limits but to treat persons as in violation of the Endangered Species Act if they go beyond those limits.[327] Thus, to be safe from prosecution, operators must refrain from cutting timber, around each owl nest site or activity center, in an area which may be as large as 3960 acres.[328]

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[319] The Guidelines use the term "incidental take," *passim*, which they describe as "'take' (as defined by the Endangered Species Act) that occurs incidentally to otherwise lawful activities. An obvious example of incidental take would be unknowingly cutting a tree which contained an owl nest with eggs or young." At 2. This should be read with the regulatory definition that "[i]ncidental taking means any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 50 CFR §17.3 (1990). Although the statute provides for a permit to exempt taking that is "incidental to, and not the purpose of, an otherwise lawful activity," 16 U.S.C. §1539(a) (1988), that procedure is slow and cumbersome, entailing submission of a large-area conservation plan, and few such permits have been sought or granted. Here, timber operators were confronted with immediate jeopardy from the moment the spotted owl was designated as threatened. Where there is no permit, the Guidelines treat any incidental take of the owl as prohibited activity unless the restrictions on cutting within the stated areas around owl nests and activity centers have been observed. At 9-11. The document states that specific information about well-studied individual owls could be used to justify an exception to the guidelines, *id.* at 10, but provides no procedure for doing so.

[320] "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. §1532(19) (1988).

[321] 50 CFR §17.3 (1990).

[322] 16 U.S.C. §1533(a)(3)(A) (1988). Such a designation for the northern spotted owl, which would not cover any private lands, is in the proposal stage. *See* News Release, U.S. Fish & Wildlife Service, Region 1, "Revised Northern Spotted Owl Critical Habitat Proposal of 8.2 Million Acres Announced by Fish and Wildlife Service" (Aug. 5, 1991).

[323] Palila v. Hawaii Dep't of Land and Natural Resources, 649 F.Supp. 1070 (D. Haw. 1986), *aff'd* 82 F.2d 1106 (9th Cir. 1988).

[324] Telephone interview with Russell D. Peterson, Field Supervisor, Fish and Wildlife Enhancement Field Office, Portland, Oregon (Aug. 8, 1991). The Guidelines state: "If a person engaged in timber harvest can demonstrate that these guidelines were followed, the Service does not intend to seek prosecution in the unlikely event that incidental take occurs in spite of implementing the guidelines." *Id.* at 9.

These rules have excited great controversy and bitter outcry about the loss of jobs and productive opportunities. Part of this has resulted from application of the Guidelines to logging on federal lands.[329] But complaint has focused as well upon the limits the Guidelines have placed upon logging on private lands, *particularly through administration of the Guideline limits by the states.*

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[325] *See* enforcement policy category 1, text at notes 160-162 *supra*.

[326] *See* enforcement policy category 2, text at notes 160-162 *supra*.

[327] "The Service gives notice that any incidental take of northern spotted owls that results from activities carried out in a manner inconsistent with the guidelines (and not authorized under the provisions of Section 7 or Section 10 of the Act) will be subject to investigation by the Service pursuant to Section 9 of the Act." Guidelines at 9.

The Guidelines at several points use language suggesting that they are tentative (*e.g.*, "these interim guidelines," p. 9) or constitute merely guidance rather than strict rules (*e.g.*, "The Service offers the following general guidance to address 'incidental' take of northern spotted owls that may occur indicentally to timber harvest or related activities," p. 9). Whether intended to be binding or not, the Guidelines nevertheless have had binding practical effect, in that the affected states and private operators have had to act upon the reasonable belief that the Guideline rules must be observed. *See* text at notes 83-88 *supra* and at notes 335-340 *infra*. The Guidelines' mention that individual situations will be considered relates, not to changing their policy, but to justifying "an exception to these Guidelines." At p. 9.

[328] Guidelines at 10-11. Specifically, the rules call for (1) conducting owl surveys in accordance with F&WS protocols, (2) avoiding harvest that results in less than 70 acres of "the best available suitable owl habitat" encompassing the nest site and/or activity center of a pair of spotted owls; (3) avoiding harvest that results in less than 500 acres of "suitable habitat" within a 0.7 mile radius (1000 acres) of a nest site and/or activity center, and (4) avoiding harvest that results in less than a 40% coverage by "suitable owl habitat" within a circle centered on the nest or activity center, having a radius appropriate for its geographical "province". In Washington, the radius for the Olympic Peninsula is 2.2 miles, which amounts to 9900 acres, 40% of which is 3960 acres; for the Cascades, the radius is 1.8 miles, amounting to 6600 acres, 40% of which is 2640 acres. For provinces in Oregon and California, the 40% areas protected against logging are either 1000 or 1360 acres in extent.

[329] Concerning the closely related action of proposing designation of a critical habitat for the spotted owl, mostly to be on federal lands, "[T]imber industry and labor officials immediately accused the agency of being too generous to the owl at the expense of American loggers. American Forest Resources Alliance director Mark Rey said more than 130,000 workers would lose their jobs because of the government's action, which he described as a 'land lockup equivalent [to the size] of Massachusetts, Vermont and Connecticut combined." Margaret E. Kriz, "Owls 1, Timber 0," NATIONAL JOURNAL, May 4, 1991, p. 1056 at 1057. *See also* "Jobs v. Owls", NATIONAL JOURNAL, Nov. 30, 1991, p. 2913.

Washington (like California) has adopted the Guideline standards, substantially whole, into the adminstration of its state forest practices laws.[330] This has resulted in a state requirement that the Guideline limits be adhered to as a condition of receiving a state permit to cut timber, even on one's own land.[331] Washington has enforced the Guideline limits by means of stop-work orders and permit denials. Here are two examples.

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[330] *See* Forest Practices Act, Wash. Rev. Code Ann. ch. 76.09 (West 1991 pocket part). Harvesting on lands known to contain a pair or the nest or breeding grounds of any threatened or endangered species is classified as a "Class IV - special" forest practice, for which special application and permit requirements must be observed. Wash. Admin. Code §222-16-050(1)(b)(i) (1989).

The examples herein will be confined to Washington, but the situation is similar in California. Oregon requires no permit for the harvesting of timber as such. The requirements of the federal Guidelines, of course, apply directly to timber operators there, as they do in Washington and California where, additionally, compliance with the Guidelines' requirements is a condition of receiving state forest practices permits for harvesting timber.

See also Cal. Penal Code §653p (West, 1987): "The violation of any federal regulations adopted pursuant to the [Endangered Species Act] shall also be deemed a violation of this section and shall be prosecuted by the appropriate state or local officials."

[331] "Based on listing of the northern spotted owl as a federal threatened species and the [Owl Guidelines] provided by the USF&WS, the DNR [Dep't of Natural Resources] has determined that the following actions and conditioning criteria on forest practices are necessary to prevent material damage to this public resource." Washington State Dep't of Natural Resources, Memorandum to Regional Managers, "Owl Memo #2 - Interim Operating Procedures for FPA Conditioning to Protect Northern Spotted Owls," p. 1 (Aug. 27, 1990). For passing upon proposed forest practice activities (such as cutting trees), the document provided criteria that are very similar to, and in important respects substantially identical to, those of the Guidelines. For example: "NO HARVEST WILL BE ALLOWED WITHIN THIS CIRCLE [having a radius of 2.2 or 1.8 miles, the same as under the Guidelines] THAT RESULTS IN LESS THAN 40% COVERAGE BY SUITABLE OWL HABITAT: 3972 ACRES ON THE OLYMPIC PENINSULA, 2523 ACRES IN THE CASCADES. If the amount of suitable habitat within this circle is less than the indicated minimum acreage, no harvest of suitable habitat will be permitted." *Id.* at 4-5 (emphasis in original). Similar provision is made for protection of 70 acres of the best habitat, and of 500 acres within a radius of 0.7 miles (1000 acres). *Id.* at 5.

In some contrast to Owl Memo #2, a successor document, Washington State Dep't of Natural Resources, Memorandum to Regional Managers, "Owl Memo #3 Interim policy and procedures for protecting the northern spotted owl" (Mar. 5, 1991), contains passages that stress the independent regulatory role of the state (*e.g.*, "Additional spotted owl protection requirements may be established or imposed as a matter of federal law, over which the DNR has no regulatory authority," *id.* at p. 1), and the flexible nature of the revised rules (*e.g.*, "These are guidelines only and may be adjusted on a case-by-case basis based on site-specific information and consultation," *id.* at p. 1). In some respects, it has recast the rules in less severely mandatory terms; for example, the provision corresponding to that quoted in the last paragraph now reads:

In December 1990, the Department of Natural Resources ordered Wind River Logging Company to "stop all work," and more specifically ordered: "Effective immediately cease all timber falling on those portions of the application within owl habitat, as indicated on the attached map. No future timber falling will be allowed until appropriate spotted owl survey information is analyzed and accepted by the Washington Department of Wildlife as proof of the absence of northern spotted owls in this location."[332] The explanation, after paraphrasing federal definitions of "take" and "harm," stated, in terms reflecting the Guidelines: "This operation is within 1.8 miles of a known spotted owl nest or breeding pair and will reduce available suitable habitat below the level necessary for the survival of the pair."[333]

A permit denial involved Betty F. Orem, whose timber land abutting the Olympic National Forest had been classified as a tree farm. "In May and June of 1989, while carrying out clearcutting operations in the neighboring National Forest, the Forest Service burned and otherwise damaged a number of Mrs. Orem's trees. In considering her subsequent compensation claim, the Forest Service advised Mrs. Orem that she had a duty to mitigate the damage by harvesting and selling the damaged trees for their salvage value. When she sought approval to conduct salvage operations and otherwise to maintain the value of her timber stand by routine thinning, however, Mrs. Orem's application was delayed and then substantially denied due to the presence of a spotted owl in the Olympic National Forest, about half a mile from her property."[334]

The Fish and Wildlife Service in August 1991 "praised the incorporation into state forest practices review processes of Federal guidelines on avoidance of 'incidental taking' of spotted owls on private lands by California and Washington * * * ."[335] But this action by the states can hardly be viewed as voluntary. They and their relevant employees were placed under a plain threat by the federal agency. States and their officers, employees, agents,

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"HARVEST WITHIN THIS CIRCLE RESULTING IN LESS THAN 40 PERCENT COVERAGE BY SUITABLE OWL HABITAT (3,972 ACRES ON THE OLYMPIC PENINSULA AND 2,523 ACRES ELSEWHERE), MAY HAVE A PROBABLE SIGNIFICANT ADVERSE IMPACT TO THE OWLS." *Id.* at p. 3 (emphasis in original). But it has retained the basic structure from the Guidelines. *See id.* at 3-4.

[332] Wash. Dep't of Natural Resources, Forest Practices Order/Notice to Wind River Logging Co. (Dec. 14, 1990).

[333] *Id.*

[334] Complaint at 6, Sweet Home Chapter of Communities for a Great Oregon v. Turner, No. 91-2218 (D.D.C. filed Aug. 30, 1991).

[335] News Release, U.S. Fish and Wildlife Service, Region 1, "Revised Northern Spotted Owl Critical Habitat Proposal of 8.2 Mililion Acres Announced by Fish and Wildlife Service" at p. 2 (Aug. 5, 1991).

deparments and instrumentalities are "persons" within the Endangered Species Act's definition,[336] and therefore fall within the Act's prohibition of "take" by "any person."[337] Their approval of timber harvesting activities that resulted in "take" under the Guidelines could render them liable on a complicity theory: "Timber harvest on State and private lands may result in the incidental take of northern spotted owls. Because the States authorize private timber harvest, they may be *party to take* on private lands, as well as on State lands. In the absence of an incidental take permit, this take would be a violation of the ESA."[338] To avoid liability, the states have had to assure that their review and permitting processes do not allow activities that would violate the Guidelines. In this way, the federal agency has in practical effect bound the states to follow the Guidelines. Further, it has conscripted the states as its regulatory agents, to force the nonlegislatively promulgated Guidelines upon private parties.[339]

In October 1991 the Fish and Wildlife Service rescinded the Guidelines, and stated that it "will investigate the need for a regulation."[340]

VIII. Recommendations

Again, our concern is with substantive agency pronouncements that fit the APA's broad definition of "rule"[341] and that as a practical matter are binding--because they either are intended to bind or are given that effect. As demonstrated,[342] any such pronouncement (other than one that interprets specific statutory or regulatory language) must be promulgated in accordance with the procedures required by the APA for legislative rulemaking.[343] Described above,[344] however, are numerous examples of such policy documents that were not issued legislatively but that should have been so issued because as a practical matter they were binding.[345]

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[336] 16 U.S.C. §1532(13) (1988).

[337] 16 U.S.C. §1538(a)(1)preamble (1988).

[338] Guidelines at 13 (emphasis added).

[339] "Agency officials said the guidelines were always meant to be strictly voluntary, but Brian Boyle, Washington state commissioner of public lands, said Wednesday such a claim was 'insane' and officials in all three states had used the guidelines to design their own owl protection plans. * * * . Boyle said that even if the guidelines were meant to be voluntary or advisory, Fish and Wildlife Service officials had made it clear his office would be held legally responsible if it didn't take steps to guard against the incidental 'taking' or killing of owls. 'Everyone felt they had a gun to their heads,' Boyle said. 'Most landowners, including my office, had assumed the guidelines had the effect of law.'" Les Blumenthal, *"Agency rescinds owl guidelines,"* The Oregonian, October 17, 1991, at B1.

[340] Memorandum from H. Dale Hall, Assistant Regional Director, U.S. Fish and Wildlife Service, Region 1, to Field Supervisors (Oct. 2, 1991). The body of this document, in its entirety, reads: "The July 1990 document titled 'Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl," is hereby rescinded. We will investigate the need for a regulation." *Id.*

[341] Text at note 30, *supra*. *See* text at note 31, *supra*, for examples.

[342] Sections II, III, V, *supra*.

In such cases, affected persons and the public generally will not have been accorded a regularized notice of the agencies' actions or an assured opportunity to participate in their development. Citizens or lawyers in Pocatello, or even in Washington, sometimes do not have ready access to the guidances or manuals that agencies are using to bind them. And when they do, they can be confused about the legal import of documents like these, and frustrated at their inability to escape the practical obligations or standards the documents impose. Often, in order to win a needed approval, they must accept the conditions demanded by the nonlegislative rule, and thereby as a practical matter surrender the opportunity to obtain court review of the offending conditions. The agencies, for their part, might not have issued these pronouncements so freely if legislative rulemaking procedures had had to be followed.

To induce agency observance of proper rulemaking procedures, it is not efficient to rely upon judicial review, which is uncertain and spasmodic and at best a belated curative. It would seem much more productive to set forth for the agencies a clear and comprehensive statement of the precepts they should obey.

Agencies have available to them two courses of procedural action by which to banish the vexing problems described in this Article. They may issue their new policies in binding form through the use of legislative rulemaking procedures (Recommendations A, C and D below). Or they may issue them nonlegislatively, and take care to treat them as nonbinding (Recommendation B below).

A. Accordingly, this Article recommends that agencies adhere to §553's legislative notice-and-comment procedures for any substantive statement of general applicability (other than an interpretative rule) that (a) is intended to establish mandatory standards or to impose obligations upon private parties, or (b) that is given that effect by the agency.[346] In the limited circumstances in which such rulemaking may be exempted from notice-and-comment requirements,[347] agencies should nevertheless observe the procedures whenever it is feasible and appropriate to do so.[348]

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[343] 5 U.S.C. §553 (1988). Exceptions to the requirements of §553 are discussed in notes 49-54 *supra*, and accompanying text.

[344] Section IV.

[345] *See* Section III, *supra*. These pronouncements were not *legally* binding, of course, because they had not been issued through the APA's legislative rulemaking procedures.

[346] This recommendation does not apply to interpretive rules--that is, statements that interpret language of a statute or of an existing legislative rule that has some tangible content. *See* text at notes 357-366 *infra*.

Values served by the legislative rulemaking procedures are large ones.[349] Fairness is furthered by giving notice to those who are to be bound, both when the proposed rule is about to be considered and when the final rule is definitively published. The accuracy and thoroughness of an agency's actions are enhanced by the requirement that it invite and consider the comments of all the world, including those of directly affected persons who are able, often uniquely, to supply pertinent information and analysis. The acceptability and therefore the effectiveness of a final rule are elevated by the openness of the procedures through which it has been deliberated and by the public's sense of useful participation in a process that affects them. Its legitimacy rests upon all of these considerations, as well as upon the foundational fact that the agency has observed the procedures laid down by Congress for establishing rules with the binding force of law. The agency's accountability for its rules is deepened by the court-made requirement of a reasoned explanation based upon a substantial rulemaking record.[350]

Beyond all of this, the APA rulemaking requirements impose a salutary discipline. That discipline deters casual and sloppy action, and thereby forestalls the confusion and needless litigation that can result from such action. And that discipline reduces tendencies toward overregulation or bureaucratic overreaching, and discourages low-profile attempts to create practically-binding norms that Congress or the Administration would not approve.[351]

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[347] Substantive issuances exempted from the required procedures by 5 U.S.C. §553(a)(1988) are those involving military or foreign affairs functions, agency management or personnel, public property, loans, benefits or contracts. To the extent agencies have voluntarily waived these exemptions, however, the procedures specified by §553 apply mandatorily. Rodway v. USDA, 514 F.2d 809 (D.C. Cir. 1975); Linoz v. Heckler, 800 F.2d 871, 877 n.7 (9 Cir. 1986)(Dep't of Health and Human Services); Lee v. Kemp, 731 F.Supp. 1101, 1112-13 (D.D.C. 1989)(Dep't of Housing and Urban Development). The rulemaking of particular agencies or programs may be exempted from the APA requirements by the agencies' governing statutes.

[348] *See* Administrative Conference of the United States, Recommendation 69-8, "Elimination of Certain Exemptions from the APA Rulemaking Requirements," 1 CFR §305.69-8 (1991), Recommendation 73-5, Elimination of the "Military and Foreign Affairs Function" Exemption from APA Rulemaking Requirements, 1 CFR §305.73-5 (1991); Arthur E. Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits or Contracts*, 118 U. PA. L. REV. 540 (1970); Arthur E. Bonfield, *Military and Foreign Affairs Function Rulemaking under the APA*, 71 MICH. L. REV. 221 (1972).

In all situations, where the use of notice-and-comment ptocedures would cause extraordinary difficulties for the agency, it may dispense with those procedures under the "good cause" exception. 5 U.S.C. §553(b)(B), (c)(3)(1988). *See* note 11 *supra*.

[349] An excellent summary and discussion of the benefits and costs of notice-and-comment rulemaking procedures is presented in Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 402-409.

[350] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983).

B. Even where an agency does not plan to observe these APA procedures, but instead contemplates a nonlegislative issuance, there is a way it can preserve its fulfilment of the values just discussed. Indeed, this is the fashion in which an agency must issue any policy statement[352]--that is, any substantive nonlegislative statement that does not interpret specific statutory or regulatory language.[353] The agency must intend that the statement will be genuinely tentative, rather than binding, and assure that it will be so treated.[354]

Accordingly, whenever practicable to do so, agencies should forthrightly declare in their nonlegislative policy documents that the stated policies are tentative, and that before they are applied to affected persons those persons will have a chance to challenge the policies (in the manner described below). In addition, agencies should establish systems to assure that agency staff, counsel, administrative law judges, relevant state officials, and others who may apply policy statements or advise on the basis of such statements, are made aware that the policies set forth in such documents are tentative, and are subject to challenge in the manner described below, before they are applied. The agency similarly should make clear to affected private parties, by specific written advice at the time an application is made or at the commencement of enforcement or other proceedings, that the policies set forth in relevant nonlegislative documents are tentative and are subject to challenge before they are applied.[355]

Then, before it applies a policy statement as herein defined[356] to a private party, the agency should afford the affected party a fair opportunity to challenge the legality or wisdom of the statement, or to suggest that a different policy be adopted in its stead, in a forum that assures adequate presentation of the affected person's positions and consideration of those positions by agency officials possessing authority to take or recommend final action upon them. (The opportunity merely to challenge the applicability of the policy, or to request waivers or exceptions from it, would not satisfy this standard.) Those agency officials should reconsider the policy afresh, in the light of the positions so advanced by the private party, with an open mind and without allowing prior publication of the policy statement in any way to foreclose the issue.

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[351] *See* Bethlehem Steel Corp. v. EPA, 723 F.2d 1303, 1309 (7th Cir. 1983).

[352] *See* Section VI, *supra*.

[353] *See* Section II.C., *supra*.

[354] "A general statement of policy is * * * neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemaking or adjudication." Batterton v. Marshall, 648 F.2d 694, 706 (D.C. Cir. 1980), *quoting* Pacific Gas and Electric Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974).

[355] If, as if often said, the purpose of the *Miranda* warning is as much to remind the police officer as it is to advise the suspect, so the agency staff official's duty to advise the private party would serve as a valuable reminder of his or her own duty to treat the guidance as tentative and subject to policy challenge.

[356] *See* text at notes 64-68, *supra*.

C. By contrast, interpretive rules--those that interpret language of a statute or of an existing legislative rule that has some tangible content[357]--are required by law neither to be promulgated by legislative rulemaking processes (as are binding noninterpretive rules) nor to be issued tentatively while the agency maintains an open mind (as are policy statements).[358] This is certainly true when the interpretation is issued merely to reduce uncertainty about the meaning of the statute and to afford guidance to staff and the public. But it remains true even when the agency intends, if it can, to make the interpretation bind affected private parties--that is, where the agency intends to act upon the interpretation and relentlessly to compel compliance with it up to the point that a court orders it to do otherwise.[359] The agency has the responsibility to administer and enforce the statute, and in order to get on with that job it must be able to take a position as to the meaning of the statute or regulation it is interpreting.[360] By its interpretation, the agency (at least in theory) is simply applying existing law and not creating new law.[361] This contrasts with an agency attempt to establish binding *noninterpretive* norms, which as an act of legislation creating new law can be accomplished only through the APA's legislative rulemaking processes.[362]

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[357] *See* text at notes 57-63, *supra*.

[358] *See* note 4 *supra*.

The Department of Agriculture only rarely issues interpretations through notice and comment procedures. Interview with John Golden, Associate General Counsel, USDA, in Washington, D.C. (Aug. 9, 1991). Concern about adequate notice to affected parties is met by publication of "notices" without opportunity for comment. *Ibid*.

[359] *E.g.*, Friedrich v. Secretary of HHS, 894 F.2d 829, 837 (6th Cir. 1990)(interpretive regulation creating no new law, that Secretary required all carriers to abide by, need not be made through §553 procedures); American Trucking Ass'n v. United States, 688 F.2d 1337, 1344 (11th Cir. 1982). *See also* Gray Panthers Advocacy Comm. v. Sullivan, 936 F.2d 1284, 1291-92 (D.C. Cir. 1991).

Though an agency intends to impose the interpretation bindingly rather than tentatively, and may do so without undergoing notice-and-comment procedures, it might not succeed in fulfilling that intention. If the interpretation is not issued legislatively, it is not binding upon courts under the doctrine of Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984); the reviewing court must give the agency interpretation respectful attention, but may arrive independently at its own interpretation, even if that of the agency is reasonable. Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 36-40, 55-60 (1990). "Such mandatory instructions are not binding on the courts, however, if they merely interpret and implement the statute and do not create new law." American Trucking Ass'n v. United States, 688 F.2d 1337, 1344 (11th Cir. 1982). Thus, despite an agency's intent to bind, interpretive rules do not "foreclose alternative courses of action [by the agency] or conclusively affect rights of private parties." Batterton v. Marshall, 648 F.2d 694, 701-02 (D.C.

It would champion the worthy precepts of the APA, however, if agencies would voluntarily make use of notice-and-comment rulemaking procedures to develop interpretive rules in certain circumstances. Implicit in the doctrine that notice-and-comment procedures are not required for interpretations is a notion that affected parties are in some sense continuously on notice of any imaginable interpretation, and that it is their business (or their counsel's) to anticipate and guard against all possibilities. But when substantial interpretive changes are afoot, the values of fair notice and public participation and agency accountability demand something better.[363]

Cir. 1980). The staff may unbendingly apply the interpretive document within the agency, but a court may set it aside.

[360] *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 865 (1984).

[361] *See* the cases cited in note 58, *supra*.

[362] 5 U.S.C. §553 (1988). "Rules that '*effect a change* in existing law or policy' are subject to the notice and comment rulemaking requirements of section 553." Mt. Diablo Hospital Dist. v. Bowen, 860 F.2d 951, 956 (9th Cir. 1988), *quoting* Linoz v. Heckler, 800 F.2d 871, 877 (9th Cir. 1986)(emphasis in the original). *See* Section II.B *supra*.

[363] The Administrative Conference of the United States in 1976 recommended that issuance, repeal or amendment of an interpretive rule "which is likely to have substantial impact on the public" should normally be developed through the procedures of APA §553; if this is impracticable, unnecessary or contrary to the public interest, the agency should so state at the time of promulgation and should ordinarily allow a post-promulgation period for public comment and reconsideration. Administrative Conference of the U.S., Recommendation 76-5, 1 CFR §305.76-5 (1991). The consultant's report on which this recommendation was based was published as Michael Asimow, *Public Participation in the Adoption of Interpretative Rules and Policy Statements*, 75 MICH. L. REV. 521 (1975). *See also* Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, generally reaffirming this position. The American Bar Association has recently adopted a resolution to substantially identical effect. Resolution approving proposal #101C, annual meeting at Honolulu, August 8-9, 1989.

The proposition that interpretive rules having "substantial impact" are *required by §553* to observe notice-and-comment procedures has been repeatedly rejected in recent years. *E.g.*, Chemical Waste Management v. EPA, 869 F.2d 1526, 1537 (D.C. Cir. 1989); American Postal Workers Union v. United States Postal Service, 707 F.2d 548, 560 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

An agency should endeavor to observe notice-and-comment procedures, I believe, whenever it contemplates the adoption of an interpretation that would 1) extend the scope of the jurisdiction the agency in fact exercises[364] 2) alter the obligations or liabilities of private parties,[365] or 3) modify the terms on which the agency will grant entitlements.[366] Of course, the rulemaking procedures

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Legislation adopted by Florida in 1991 subjects every "rule" (defined as "each agency statement of general applicability that implements, interprets, or prescribes law or policy * * *," Fla. Stat. Ann. ch. 120.52 (Harrison 1985)) to a statutory notice-and-comment rulemaking procedure, Fla. Stat. Ann. ch. 120.54 (Harrison 1985), with no exemption for interpretive rules or policy statements. 1991 Fla. Laws ch. 91-30 (Apr. 27, 1991).

The Administrative Conference is currently considering a proposal of its Rulemaking Committee that certain "significant" categories of rules fitting the APA's exemption for "rules of agency * * * procedure or practice," 5 U.S.C. §553(b)(A)(1988), be voluntarily made the subject of notice-and-comment procedures. Administrative Conference of the United States, [proposed] Recommendation 92-__; 5 CFR §305.92-__ (1992).

[364] A proposed interpretation may reach beyond the literal terms of the statute in unexpected ways, while arguably remaining within the perimeter of the agency's statutory authority. A vivid example is offered by the memorandum, described above at notes 169-176 and accompanying text, by which an officer of the Corps of Engineers declared jurisdiction over millions of acres newly identified as 'waters of the United States' connected to interstate commerce on the basis that they were or could be used as habitat by migratory birds. Although the court in the *Tabb Lakes* case held the memorandum was not interpretive and therefore should be set aside for failure to observe §553 rulemaking procedures, text at notes 194-195, *supra*, the memorandum could be regarded as an interpretation of the pertinent regulation, as a similar statement was apparently assumed to be in the *Leslie Salt* case, *see* note 195 *supra*. Notice-and-comment procedures are eminently sensible in such cases.

[365] *See e.g.*, Fertilizer Institute v. EPA, 935 F.2d 1303, 1307-09 (D.C. Cir. 1991)(interpretation declaring that stockpiling of reportable quantities of a hazardous substance is a "release," and setting minimum release levels of radionucleides, was validly issued without notice-and-comment procedures even if it had effect of creating new duties).

To the extent EPA's top-down policy might have been viewed as an interpretation as to which notice-and-comment procedures were not required, *see* text at notes 223-226 *supra*, it strikingly illustrates the sort of imposition of obligations for which the use of notice-and-comment procedures is recommended by this Report.

"[A]lthough [the announcement] serves as an interpretation of existing law, it also effectively enunciates a new requirement heretofore nonexistent for compliance with the law. * * * . If left undisturbed by this court, this agency action would wield a significant change in the practices which private employers must follow and in the enforcement steps the agency must take. Under these circumstances, I believe that advance notice and opportunity for public participation are vital if a semblance of democracy is to survive in this regulatory era." Chamber of Commerce of U.S. v. OSHA, 636 F.2d 464, 471-72 (D.C. Cir. 1980)(Bazelon, J., concurring).

[366] *See, e.g.*, American Postal Workers Union v. United States Postal Service, 707 F.2d 548 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984)(changed interpretaton of statutory term reduced retirement annuities of 113,000 prospective retirees).

need not be considered unless the change of interpretation is a substantial one, that does not derive in an obvious way from established norms.

D. A final cluster of recommended practices springs from the rather obvious proposition that it should be the agency's responsibility to make the purport of its issuances clear and accessible.[367] If the agency intends an issuance to be legislative and therefore to be legally binding, it should say so,[368] in order that staff and affected persons will be definitively informed of the agency's intentions. It should also explain specifically how its issuance has gained legislative status. Ordinary citizens or even ordinary lawyers should not have to puzzle out the particulars of the agency's authority or its observance of procedural requirements.[369] If the agency expects to apply its document in a binding way, it should be willing to declare that the rule is a legislative one, and to back up that claim with a showing of the specific authority and procedures it has observed.[370] If these simple declarations were

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In 1990 the Department of Agriculture changed its interpretation of an exclusion from the Food Stamp Act's definition of "income," 7 U.S.C. §2014(d)(11)(1988), to require that certain HUD energy assistance payments to publicly-assisted housing tenants, who pay their utilities separately, be counted as "income." Food Stamp Program Policy Memo 90-6, "HUD Payments," issued by Thomas O'Connor, Director, Program Development Division, p. 1 (Feb. 9, 1990). If the HUD payments are made directly to the tenant or to the utility provider, rather than to the landlord, the amounts are included in the tenant's income. *Id.* at 1. Since eligibility for food stamps is a function of income, 7 U.S.C. §§2014, 2017 (1988), the food stamp allowances of tenants directly receiving the HUD payments are reduced. *See* West v. Bowen, 879 F.2d 1122, 1129-32 (3rd Cir. 1989), which rejected a substantially identical earlier position taken by USDA. USDA's Food Stamp Policy Memo 90-6, *supra*, stated that its "policy applies in all States except those in the third circuit, i.e. Pennsylvania, Delaware, New Jersey and the Virgin Islands, where there is a court order that HUD utility payments be excluded as energy assistance payments." *Id.* at p. 1.

[367] That is the thrust of the APA's publication and public inspection requirements, 5 U.S.C. §552(a) (1988).

[368] Addressing what he termed "interpretative rules with legislative effect," Professor Saunders proposed: "The agency should elect whether it wishes its interpretative rule to enjoy legislative effect. If the agency so chooses, then it must follow the procedures required of legislative rules." Kevin W. Saunders, *Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 DUKE L.J. 346, 373.

[369] Assuming the agency has no interest in creating confusion, it can gain nothing by withholding this information, whereas disclosing it can increase the effectiveness of a rule by leading affected persons to realize that the rule has the force of law.

[370] "Because a rule promulgated pursuant to an agency's legislative authority is entitled to greater deference by the courts than are interpretative rules or policy statements, [citations], one runs greater risks in not following legislative rules. It is therefore important to inform the public at the time of promulgation that a rule is legislative, * * * . Levesque v. Block, 723 F.2d 175, 179-80 (1st Cir. 1983)(McGowan, J., sitting by designation).

required, the public and the courts could know that documents issued without them were nonlegislative, and treat them accordingly.

Thus, this Article recommends that, in issuing any legislative rule, the agency publish as a part of the document promulgating the rule (a) a statement that the agency intends the rule to be a legislative rule, with the force of law, (b) a statement of the way in which specific statutory provisions confer upon the agency the authority to issue this particular rule in legislative form,[371] and (c) a statement of the specific steps the agency has taken to satisfy the elements of rulemaking procedure required by 5 U.S.C. §553 and by any other applicable statutory provisions.[372]

Agencies will protest that the procedures called for by these recommendations will prove bothersome and will place pressures upon their time and resources. No doubt this is true. Legislative rulemaking procedures can levy upon limited agency funds, people and other resources.[373] It must be

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A useful parallel is found in the APA: "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the FEDERAL REGISTER and not so published." 5 U.S.C. §552(a)(1) (1988).

[371] The APA's only mention of a rule's statutory authority requires "reference to the legal authority under which the rule in proposed" to be included in the notice of *proposed* rulemaking. 5 U.S.C. §553(b)(2) (1988). Perhaps the requirement in §553(c), that final rules incorporate "a concise general statement of their basis and purpose," could be read to require mention of statutory authority at that stage. *See also* the rules of the Administrative Committee for the Federal Register concerning citations of authority, 1 CFR §§21.40 - 21.53 (1991). Agencies often satisfy these loose requirements by citing the entirety of a statute, or citing a section number followed by "*et seq.*" In no place is the agency called upon to state the *specific* provision that authorize a rule like the specific rule at hand *to be issued legislatively*.

[372] The following sample statement illustrates the brevity and simplicity with which the recommendations in the text can be implemented: "This rule is published as a legislative rule and has the force of law. It is authorized to be issued in legislative form by 72 U.S.C. §1234, which provides that 'the Commission may make such rules and regulations as are necessary to carry out the provisions of this chapter.' Elements of rulemaking procedure required by statute have been complied with in the following way: Notice of proposed rulemaking for this rule, in compliance with 5 U.S.C. §553(b)(1,2,3), was published in the Federal Register on July 25, 1993, 58 FR 34567. The Notice invited all interested persons to submit written data, views, arguments and comments on the proposed rule, on or before November 1, 1993. The public hearing required by the Commission's enabling statute, 72 U.S.C. §1235, was held in Hearing Room 2 in the Commission's offices at 2120 J Street, N.W., Washington, D.C. 20000, on October 1, 1993. The statement of the final rule's basis and purpose, as required by 5 U.S.C. §553(c), is published herewith."

[373] *See* Thomas O. McGarity, *Thoughts on "Deossifying" the Rulemaking Process*, 1992 DUKE L.J. ____; Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43 (1992). The "good cause" exception to notice-and-comment rulemaking procedures is available

remembered, though, that agencies exist solely to serve the public in accordance with the law. The costs of observing the law and fair procedure are bedrock obligations that cannot legitimately be slighted simply because an agency might lack adequate resources or prefer to direct them elsewhere. At worst, they are a price to be paid for lawfulness and openness and accountability in government. The recommended procedures are in the greatest part required by the law, which should not be dishonored in the name of a false economy.[374] The balance of the recommendations--in the spirit of the APA--call for the agencies to forswear coyness and advise the public candidly of the actions they are taking. The recommended procedures will avert the imposition of needless cost and confusion upon the public, and will foster a more uniform and punctilious process of administration within the agencies.

In short, if an agency wants to bind the public, it should do it right. It should not try to do it on the cheap or on the sly. It should observe the authorities and procedures laid down by Congress, and it should make use of some simple procedures to tell the public in a helpful way what it is doing.

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where use of those procedures would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. §553(b)(B), (c)(3)(1988). *See* note 11 *supra*.

[374] If the burdens of lawful rulemaking become so severe that the agency cannot act effectively, it can seek legislation empowering it to make legislative rules in a less burdensome manner.

Report for Recommendation 92-3

New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

Introduction

At the time of its enactment, the 1968 Fair Housing Act seemed to be the final nail in the coffin of an elaborate system of state-sanctioned racial segregation which prevailed during the first half of the twentieth century. After the Supreme Court endorsed the policy of racial segregation in 1896,[1] African-Americans were crowded into urban ghettos in which the predominate features were substandard housing, and unsafe living conditions. Beginning in 1917, the opponents to policies favoring segregated housing began a decades-long struggle to obtain fair housing laws.[2] After a preliminary victory in Shelley v. Kraemer,[3] in which racially-restrictive covenants were declared unenforceable, the Supreme Court finally reversed the separate but equal doctrine of Plessy v. Ferguson in the 1954 school desegregation case, Brown v. Board of Education.[4]

The Brown decision prompted an era of Civil Rights activism which culminated in the Civil Rights Act of 1964,[5] the Voting Rights Act of 1965[6] and the Fair Housing Act of 1968.[7] Despite the enactment of these statutory prohibitions against racial discrimination, 25 years later, the vast majority of African-Americans still occupy the lowest paying and least desirable jobs. Black children continue to receive inferior educations in segregated schools and the majority of black families reside in what a 1989 study described as a condition of "multi-dimensional hyper segregation."[8] In a study published in 1991, the Department of Housing and Urban Development concluded that "both blacks and hispanics can expect to encounter some form of systematic unfavorable treatment in more than half of their visits to inquire about housing."[9]

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[1] Plessy v. Ferguson, 163 U.S. 537 (1896).

[2] Buchanan v. Warley, 245 U.S. 60 (1917). The Court in Buchanan invalidated a Louisville, Kentucky ordinance prohibiting black families from owning, renting or occupying property outside of specified areas within the city. See generally, Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 WASH. U.L.Q. 737, 739 (1989).

[3] 334 U.S. 1 (1948).

[4] 347 U.S. 483 (1954).

[5] 42 U.S.C. §§2000a to 2000h-6 (1982 & Supp. IV 1986).

[6] Id. §§1971-1974e.

[7] Id. §§3601-3619, 3631, as amended by Pub. L. No. 100-430, 102 Stat. 1619 (1988).

[8] Massey & Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions, DEMOGRAPHY*, Vol 26, No. 3 August (1989).

[9] Yinger, Housing Discrimination Study, Incidence of Discrimination and Variations in Discriminatory Behavior (1991).

As these studies make clear, racial discrimination in housing remains the most visible vestige of formal segregation and its impact can be seen in the deepening degradation of the nation's innercities. Some gains have been made; most notably in the migration of middle-class black families whose economic circumstances have allowed them to escape from the ghettoes. Nevertheless, laws prohibiting discrimination in housing have not resulted in the elimination of segregated housing patterns. Furthermore, the records of the federal agencies responsible for Fair Housing enforcement have been dismal.

Shortly after the enactment of the 1968 legislation, the shortcomings of the statute became apparent to Fair Housing proponents. The original administrative enforcement mechanism was limited to sanctionless conciliation, a process tantamount to voluntary compliance that was largely ignored by the real estate industry. A private right of action was established but even if a victim of housing discrimination prevailed (often after years of expensive and protracted litigation) the relief awarded typically consisted of a nominal award of damages and an injunction that ordered the defendant to simply comply with existing law.

Congress eventually became aware of these failings and after nearly a decade of abortive efforts, it enacted in 1988, a comprehensive overhaul of the enforcement mechanism and added two new categories to the groups falling under the Fair Housing Act's protections. After languishing for 20 years with virtually no enforcement authority, the Department of Housing and Urban Development now has what is probably the most comprehensive enforcement mechanism of any possessed by the various federal agencies that are charged with Civil Rights enforcement responsibilities. In fact, the statutory enforcement process established by the 1988 Amendments should prove to be a model for other agencies.

This study will analyze the key provisions of the 1988 legislation and examine HUD's implementation efforts during the 2-year period following the effective date of the Amendments. The first section reviews briefly the history of housing discrimination in America and the early efforts to eliminate segregated housing patterns. The second section examines the 1968 Fair Housing Act, the legislative history of that statute and the enforcement mechanism established by the original Fair Housing legislation. The next section reviews the enforcement efforts that were made under the 1968 Act and includes a discussion of the failings which led to the 1988 Amendments. The 1988 Amendments are discussed in the following section along with the legislative history of the new Amendments. After a detailed examination of the enforcement mechanism established by the 1988 Amendments, the study concludes with an analysis of the implementation efforts which occurred during the 2-year period following the adoption of the 1988 Amendments.

As we shall see, the Department of Housing and Urban Development has made significant strides towards the implementation of the enforcement process. However, the addition of two new protected categories (families with children and individuals with disabilities), has resulted in a considerable increase in HUD's caseload. This addition has slowed the processing of Fair Housing complaints to such an extent that only a fraction are processed within the 100-day maximum allotted by the statute. The delay creates a bottleneck in administrative process; it violates the statute and is contrary to the efficient administrative process Congress envisioned.

A second problem concerns the high percentage of cases in which the parties elect to litigate in district courts rather than pursuing the administrative process before an administrative law judge. These elections do not result in the speedy resolution of Fair Housing claims Congress anticipated when it created what was intended to be an inexpensive and expeditious administrative process. Another problem concerns the failure of State and local Fair Housing agencies to secure certification under the 1988 Amendments. Because the Fair Housing Act anticipates shared responsibility for enforcement, a diminished level of enforcement at the State and local levels will shift far more enforcement responsibility to HUD than Congress anticipated when it enacted the 1988 Amendments. This will at minimum, require an allocation of more resources at the federal level than originally anticipated. These concerns are discussed in greater detail below. The final section contains some suggestions for addressing these problems.

I. The Origins Of Racially Segregated Housing

Racially segregated housing patterns are a remnant of a pervasive system of government sponsored racial discrimination which was validated by the separate but equal doctrine of Plessy v. Ferguson, an 1896 decision which permitted segregation on public transportation.[10] Segregation in public facilities began in the post-Reconstruction era and spread rapidly during the final decades of the 19th century. Segregated housing was merely one aspect of an elaborate system. By the early years of the 20th century, African-Americans were segregated in virtually all aspects of economic and social relations.[11]

Early efforts to establish segregated housing were mainly a reaction to the migration of black families from rural areas to urban industrial centers. The beginnings of this migration coincided with the First World War and continued up to and after the Second World War.[12] The movement was encouraged by the availability of enhanced employment opportunities in cities and by a mass flight from economic deprivations and racial tensions which prevailed in the south. One response to the black migration was the adoption of legislation which prohibited African-Americans from owning or renting property except in designated locations. Because these ordinances involved state action which discriminated on the basis of race, they were challenged and eventually declared unconstitutional in a 1917 decision, Buchanan v. Warley.[13]

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[10] 163 U.S. 537 (1896).

[11] Woodward, The Strange Career of Jim Crow, Oxford University Press (1974).

After Buchanan, property owners resorted to private covenants to enforce racially segregated housing patterns. The Supreme Court affirmed the widespread use of private covenants in a 1926 decision, Corrigan v. Buckley.[14] Although the Supreme Court declined to review the merits of Corrigan on jurisdictional grounds, it issued an opinion in which it indicated in dicta that unlike Buchanan, the private covenants in Corrigan did not include the state action needed to invoke the Equal Protection Clause of the Constitution. This, in effect, operated to validate private covenants as means of maintaining segregated housing in the United States.

After private covenants were approved in Corrigan, the use of racially-restrictive covenants accelerated rapidly. In communities across the nation, African-Americans and other racial minorities were confined to discrete residential districts in which the prominent features were substandard housing and overcrowded conditions. Nevertheless, the population explosion caused by the continued migration of black families resulted in arrangements that were used to circumvent the covenants. The most prevalent of these was the use of a white "strawman" who would purchase property and thereafter resell it to a black purchaser, usually at a substantial profit. As more black families relocated to urban centers, the demand for housing increased exponentially, causing the continued circumvention of covenants. This, in turn, generated litigation by white home owners to enforce the covenants. Over the years, many of these cases were handled by NAACP lawyers and some limited successes were secured in cases like Hansberry v. Lee,[15] in which the Supreme Court refused to enforce a racially-restrictive covenant on procedural grounds. Beginning in 1945, however, the NAACP convened a series of conferences to discuss the pending covenant cases and to develop an overall strategy for securing a victory in the Supreme Court. The first meeting was held in

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[12] See Myrdal, An American Dilemma (1944).

[13] 245 U.S. 60 (1917).

[14] 271 U.S. 323 (1926).

[15] 311 U.S. 32 (1940).

Chicago in July 1945.[16] Others were held in New York City and Washington, DC The NAACP's coordinated strategy culminated in May 1948, when the Supreme Court issued its decision in Shelley v. Kraemer.[17]

The central issue in Shelley involved consideration of whether judicial enforcement of the racial covenants could be deemed to be state action for purposes of the Fourteenth Amendment. In a decision which continues to generate some controversy, the Supreme Court held that private covenants were permissible, but could not be enforced by the Courts since this would constitute state action which would violate the Fourteenth Amendment.

The Supreme Court's decision in Shelley v. Kraemer was the result of a highly organized effort involving more than 30 years of litigation in hundreds of cases. From 1926 to 1947, the NAACP and the lawyers fighting against the covenants lost the vast majority of the hundreds of cases in which they challenged the covenants. By 1944, The American Law Institute's Restatement of Property, one of the most influential treatises in the field, had endorsed racial covenants as a valid exception to the general rule against restraints on the alienation of property. In the face of a vast amount of adverse legal precedent, the NAACP lawyers retained the faith that they would ultimately prevail. Their perseverance bore fruit with the Supreme Court's landmark decision in Shelley v. Kraemer.[18]

After the Shelley decision was issued, the Federal Housing Administration and the Veterans Administration announced that they would not insure mortgages on property encumbered by racially restrictive covenants.[19] In a denouement to Shelley, the Supreme Court held in Barrows v. Jackson,[20] that damages could not be awarded against a property owner who had breached a racially-restricted covenant by selling her home to a black family.

After the decision in Barrows, however, the focus of the Civil Rights campaign moved from discrimination in housing to school desegregation cases.[21] These efforts ultimately resulted in Brown v. Board of Education,[22] the case in which the Supreme Court finally repudiated the separate but equal doctrine of Plessy by holding that the Equal Protection Clause of the Fourteenth Amendment prohibited the states from maintaining racially segregated public schools. The Court later applied the Brown precedent to other forms of state-sanctioned segregation.[23]

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[16] Minutes of the NAACP Chicago Conference (July 9-10, 1945), Records of the NAACP, Group II Box 133 (Library of Congress).

[17] 334 U.S. 1 (1948).

[18] The Supreme Court's decision in Shelley v. Kraemer, 334 U.S. 1 (1984), was actually a consolidation of appeals from two state supreme court decisions: Kraemer v. Shelley, 198 S.W. 2d 679 (Mo. 1946) and McGhee v. Sipes, 25 N.W. 2d 639 (Mich. 1947). The companion decision, Hurd v. Hodge, 334 U.S. 24 (1948), represented the consolidation of two cases concerning properties located in the District of Columbia: Hurd v. Hodge and Urciolo v. Hodge.

[19] See Historical Overview ▪ Equal Opportunity in Housing, P.H.: Fair Housing-Fair Lending Rptr. §2301 at 2303.

[20] 345 U.S. 249 (1953).

The 1950s and 60s are remembered as an era of Civil Rights activism but Fair Housing remained a relatively dormant issue until the early 1960s when President Kennedy issued Executive Order 11063 on November 20, 1962.[24] This Order directed federal agencies to prohibit discrimination in transactions involving property that was owned, operated, or financed by the federal government. The Order was limited, however, to federally assisted housing and did little to alter the segregated housing patterns that existed at that time. The next major step towards Fair Housing took place when the bill which became the Fair Housing Act of 1968 was introduced in the Senate.

II. The Fair Housing Act of 1968

The 1968 Fair Housing Act prohibited discrimination based on race, color, religion, sex and national origin in connection with the sale or rental of residential housing.[25] Coverage under the 1968 Act extended to: housing owned or operated by the federal government; dwellings supported in whole or in part with the aid of federal loans, advances, grants or contributions; houses and buildings supported in whole or in part by federally secured financing; residences purchased, rented, or otherwise obtained using federal funds.[26]

The Act also prohibited, in connection with selling or renting residences; refusing to deal;[27] discrimination with respect to terms;[28] discriminatory advertising;[29] false representations that a dwelling was not available for sale or rent;[30] and making representations, whether true or false, regarding the availability of housing to persons of a particular race, color, religion, sex or national origin.[31]

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[21] See Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality, Vintage, 1975.

[22] 347 U.S. 483 (1954).

[23] See e.g., Mayor & City Council v. Dawson, 350 U.S. 877 (1955) (beaches); Holmes v. Atlanta, 350 U.S. 879 (1955) (golf course); Gayle v. Browder, 352 U.S. 903 (1956) (buses); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (parks).

[24] 27 Fed. Reg. 11,517 (1962).

[25] Fair Housing Act of 1968, 42 U.S.C. §3601-3619 (1981). See generally, hearings on S. 1353, S. 2114, and S. 2280 before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 8-13, 260-264.

[26] 42 U.S.C. §3603(a) (1981).

[27] Id. §3604(a) (1981).

[28] Id. §3604(b) (1981).

Exemptions from the 1968 Act's coverage included: single family homes owned by private individuals who owned less than four dwellings, as long as in any 2-year period, the individual did not sell more than one residence in which he was not the most recent resident; and multifamily dwellings consisting of less than four units, if the owner resided in one of the apartments (the "Mrs. Murphy" exception). This did not apply, however, to dwellings sold or rented by a broker or other person involved in the real estate business, or if discriminatory advertising was used in the transaction.[32]

A. The Legislative History of the 1968 Act

The 1988 Amendments to the Fair Housing Act might not have been needed if the original bill had passed without a compromise which resulted in the deletion of certain provisions that would have established an enforcement procedure which closely resembles the enforcement mechanism created by the 1988 Amendments. The Fair Housing Act of 1968 had its genesis in S.1358, a bill which was originally offered by Senator Walter Mondale as an amendment to another bill, H.R.2516,[33] which had been passed by the House and was intended to provide protection for civil rights workers. Senator Mondale's bill followed far-reaching Civil Rights legislation that had been enacted in previous years. In 1964, Congress enacted comprehensive Civil Rights legislation which outlawed segregation in public facilities, federally-assisted educational facilities and made job discrimination unlawful. In 1965, the Voting Rights Act extended the franchise to thousands of black citizens who resided in several southern states.

The debates over the passage of the Fair Housing Act occurred in a period marked by large scale Civil Rights and antiwar demonstrations. The peaceful, nonviolent protests and marches which began during the early 1960s had given way to devastating urban riots which left vast areas of major cities in flames. In this highly-charged atmosphere, the debates over Fair Housing commenced.

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[29] Id. §3604(c) (1981).

[30] Id. §3604(d) (1981).

[31] Id. §3604(3) (1981).

[32] Id. §3603(b) (1981).

[33] H.R.2516, 90th Cong., 1st Sess. (1967).

Hearings on the Fair Housing bill, S.1358[34] began in August 1967. The Subcommittee conducting the hearings secured the testimony of several individuals including Attorney General Ramsey Clark, Secretary of Housing and Urban Development Robert Weaver, various law professors, government employees and church leaders. Some of these individuals spoke in favor of the bill, while others opposed its passage.[35] However, the Committee took no action on the bill at that time.

The next session of the Senate convened in January 1968. Majority Leader Mike Mansfield announced that the house-passed bill providing protection to civil rights workers would be taken up as the first order of business during this session. Meanwhile, Senator Mondale secured the support of other Senators to add his Fair Housing proposal to the Civil Rights bill. The "Mrs. Murphy" exemption was added, which removed from the bill's coverage dwellings containing up to four units if one of the units was occupied by the owner.[36] Most of the Banking and Currency Committee members supported Senator Mondale's amendment.[37]

When the Senate debates began, the Attorney General testified that the legislation was supported by the Equal Protection and Commerce Clauses of the United States Constitution.[38] Other witnesses testified that fair housing would have a positive psychological and economic impact on black Americans because of the employment and educational opportunities which were available outside ghetto areas. Testimony offered during the hearings revealed, among other things, that many jobs had relocated from inner-city areas to the surrounding suburbs, and that residents of inner-city areas, who did not have access to the suburban jobs suffered from severe unemployment rates.[39]

Opponents to the Fair Housing bill claimed that the legislation would interfere impermissibly with the right of citizens to control the disposition of their property.[40] Senator Sam Ervin, Jr. contended that the bill was "an attempt to destroy the basic property rights of all Americans. It is proposed to rob all Americans, 200 million Americans of all races, of a basic right, in the expectation that such action will make them forget race or religion and live in integrated fashion."[41] Other opponents feared that the bill would force integration by the use of racial quotas in housing. One opponent wondered whether "our society [will] benefit from sending a swarm of Federal investigators and enforcers over the land to break down the doors of private boardinghouses or close them down?"[42]

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[34] Hearings on S.1358, S.2114 and S.2280 before a Subcomm. of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. (1967).

[35] Hearings, supra note 34.

[36] 114 Cong. Rec. S.1876 (daily ed. Feb. 28, 1968).

[37] 114 Cong. Rec. S.985 (daily ed. Feb. 6, 1968).

[38] Hearings, supra note 34 at 8-14.

[39] Id. at 3.

[40] 114 Cong. Rec. S.1453 (daily ed. Feb. 20, 1968).

[41] 114 Cong. Rec. S.3249 (1968).

Responding to these arguments, the proponents assured the opposition that the basic right to buy, sell or rent property would not be affected. The proposal, they explained, simply prohibited racial discrimination. As one supporter explained "[t]he basic purpose of this legislation is to permit people who have the ability to do so to buy any house offered to the public if they can afford to buy it. It would not overcome the economic problem of those who could not afford to purchase the house of their choice."[43] Supporters of the bill emphasized that the legislation would require sellers, landlords and real estate agents to treat all prospective buyers or tenants equally, regardless of race.[44]

Senator Mondale argued, for example, that "America's goal must be that of an integrated society, a stable society. If America is to escape apartheid we must begin now, and the best way for this Congress to start on the true road to integration is by enacting fair housing legislation."[45] Another supporter, Senator Edward Brooke, expressed his belief that the nation had a moral obligation to assure fair housing. "America's future," he argued, "must lie in the successful integration of all our many minorities, or there will be no future worthy of America."[46]

Approximately 2 weeks after the Fair Housing bill's introduction, Senate Majority Leader Mansfield called for a vote. Opponents led by Senator Ervin objected. Senator Ervin and other opponents argued that the federal government should defer fair housing policy to the states, especially since a majority of the states already had some form of fair housing legislation. After obtaining the signatures of 29 Senators, Majority Leader Mansfield filed a petition to invoke cloture.[47] The Senate rejected cloture 55 to 37[48] but supporters refused to let the bill die, as evidenced by a vote of 58 to 34 in opposition to a move to permanently table the amendment[49] and by the signatures of the 44 senators who endorsed the next cloture petition.[50] This second cloture vote failed by a vote of 56 to 37.[51]

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[42] Statement of Sen. Stennis (114 Cong. Rec. 3346).

[43] Statement of Senator Mondale (114 Cong. Rec. 3421).

[44] 114 Cong. Rec. S.1453 (daily ed. Feb. 20, 1968).

[45] 114 Cong. Rec. S.3422.

[46] 114 Cong. Rec. S.2525

[47] 114 Cong. Rec. S.1371 (daily ed. Feb. 16, 1968).

[48] 114 Cong. Rec. S.1454 (daily ed. Feb. 20, 1968).

[49] 114 Cong. Rec. S.1583 (daily ed. Feb. 21, 1968).

The Fair Housing Amendments of 1988 might have been unnecessary if the original bill passed without the deletion of certain key provisions. The original bill provided for enforcement by HUD with provisions for conciliation of complaints as the first step in the enforcement process. If conciliation failed, the Secretary could issue a complaint, hold hearings, and if discrimination was found, the Secretary could issue enforcement orders subject to judicial review. In an effort to secure needed support for the legislation, Senator Everett Dirksen developed a compromise to replace these provisions. The Dirksen amendment drastically reduced the Department of Housing and Urban Development's enforcement powers. It also removed from the bill's coverage single family homes that were sold by owner-occupants who did not utilize the services of a real estate broker.[52] Senator Mondale later proposed that his amendment to 2516 be tabled. It was, by a vote of 83 to 5.[53] Senator Dirksen submitted a cloture petition on his substitute amendment, which was signed by 48 senators.[54] The Senate rejected cloture again by 58 to 35.[55]

Additional support for the Fair Housing bill was generated by the report of the Kerner Commission which was issued on March 1, 1968. The Kerner Commission described at length the dismal state of American race relations. In a much quoted conclusion the Report found that "America is dividing into two societies, black and white, separate and unequal."[56] After the Report was received, the Majority Leader filed for cloture a fourth time.[57] The Senate was finally able to reach cloture on the amendment to H.R. 2516 by a vote of 63 to 32 (the two-thirds required) and the legislation's passage was virtually assured since all of the Senators who voted in favor of cloture would also vote in favor of the Dirksen amendment.[58]

By the time cloture finally occurred, more than 80 amendments to the Dirksen amendment had been proposed.[59] One notable amendment offered by Senator Byrd of West Virginia exempted from the act's coverage single-family homes sold through a real estate agent. The Senate rejected this proposed amendment.[60] Nevertheless another exemption excluding certain vacation homes passed.[61] The Senate finally passed H.R. 2516, as amended, on March 11, 1968, by a vote of 71 to 20.[62] The bill was later returned to the House of Representatives for approval. When the Senate bill reached the House, an objection was made to the Senate's request for unanimous consent to the amendments; thus, H.R. 2516 was sent to the Rules Committee.[63]

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[50] Id. at S.1644.

[51] 114 Cong. Rec. S.1729 (daily ed. Feb. 26, 1968).

[52] 114 Cong. Rec. S.1876 (daily ed. Feb. 28, 1968).

[53] 114 Cong. Rec. S.1877 (daily ed. Feb. 28, 1968).

[54] 114 Cong. Rec. S.1883 (daily ed. Feb. 28, 1968).

[55] 114 Cong. Rec. S.1972 (daily ed. March 1, 1968).

[56] 114 Cong. Rec. S.1960 (daily ed. March 1, 1968).

[57] 114 Cong. Rec. S.1974 (daily ed. March 1, 1968).

[58] 114 Cong. Rec. S.2035 (daily ed. March 4, 1968).

[59] 114 Cong. Rec. S.2034 (daily ed. March 4, 1968).

Dr. Martin Luther King, Jr.'s assassination on April 4, 1968, and the resulting widespread civil unrest provided the final impetus needed to push H.R. 2516 out of the House Rules Committee. During the final debates, a House member urged the bill's approval stating that "[t]he assassination of Martin Luther King, Jr., has given us a tragic reminder of the urgency for Federal protection of the exercise of civil rights. It is required unless the explosive concentration of Negroes in the urban ghettos is to continue. The hour is late. If Congress delays, it may be writing the death warrant of racial reconciliation."[64] On April 9, the House decided to approve the Senate's version of the H.R. 2516 without any additional amendments. Debates were held on the following day. During those debates, Representative Ryan concluded that fair housing legislation was "a means to achieve the aim of an integrated society."[65] Another supporter, Rep. Celler, the Chairman of the House Committee on the Judiciary, also pressed for the bill's passage "to eliminate the blight of segregated housing."[66] The House eventually approved H.R. Res. 1100 by a vote of 250 to 195. The Fair Housing Act of 1968 finally became law when President Lyndon Johnson signed H.R. 2516 on April 22, 1968.[67]

B. The Enforcement Mechanism of The Fair Housing Act of 1968

The enforcement provisions of the 1968 Act consisted of: (1) administrative proceedings within the Department of Housing and Urban Development; (2) administrative proceedings by a State or local agency; (3) a civil action commenced by an aggrieved party in a United States district court;

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[60] 114 Cong. Rec. S.2053 (daily ed. March 4, 1968).

[61] 114 Cong. Rec. S.2360 (daily ed. March 7, 1968).

[62] 114 Cong. Rec. S.2578 (daily ed. March 11, 1968).

[63] 114 Cong. Rec. H.R. 1959 (daily ed. March 14, 1968).

[64] Statement of Representative Ryan (114 Cong. Rec. 9589 1968).

[65] 114 Cong. Rec. H.R. 9591 (1968).

[66] 114 Cong. Rec. H.R. 9559 (1968).

[67] 114 Cong. Rec. H.R. 2826 (1968).

and (4) civil enforcement actions in pattern and practice cases filed by the Attorney General of the United States.[68] Despite these various avenues for securing redress, the enforcement provisions of the original Fair Housing Act were not very aggressive, reflecting, as they did, a heavy reliance on a conciliation and voluntary compliance approach. Much of the enforcement burden was shifted to State and local fair housing agencies. The federal enforcement mechanism was not available to redress violations of federal law when State or local laws were deemed substantially equivalent to the procedures and remedies accorded by the federal Fair Housing Act.[69] Even when there was no preemption by State or local law, HUD's enforcement role was limited primarily to the investigation and conciliation of complaints.[70]

The 1968 Act also established a private right of action to enforce violations of the federal statute but even if a litigant could secure a federal forum, the remedies available were limited to injunctive relief, actual damages and a maximum of $1,000 in punitive damages.[71] Given these drastic limitations on the federal government's role in enforcing the statute, it is not difficult in retrospect to understand why so little was accomplished during the 20-year period between the enactment of the original Fair Housing Act and the 1988 Amendments.

1. Administrative Proceedings

The enforcement provisions of the 1968 Act were set forth in Section 810(a) of the statute.[72] Under these provisions, persons aggrieved by practices prohibited by the federal Fair Housing Act could file a complaint with the Secretary of HUD. When complaints were filed, the Secretary was obligated to conduct an investigation and to eliminate any discriminatory practices that were found through informal methods consisting of conferences, conciliation and persuasion.[73] All complaints had to be filed within 180 days of the date that the act of discrimination occurred.[74] Section 811(a) of the original legislation authorized the Secretary to issue subpoenas to compel the attendance of witnesses.[75] Section 810(a) also authorized the Secretary to submit interrogatories to respondents.[76] To enforce subpoenas, the Secretary was required by Section 811(e) to pursue an action in a United States district court.[77] Section 811(g) required the Attorney General to conduct any litigation in which the Secretary participated as a party or as amicus.[78]

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[68] The Fair Housing Act of 1968 §810(c), 42 U.S.C. §3601-3619 (1981).

[69] Id. §812(c).

[70] Id. §812(a).

[71] Id. §812(c).

[72] Id. §810(a).

[73] Id.

[74] Id. §810(b).

[75] Id. §811(a).

2. Referrals To State And Local Agencies

Under the 1968 Legislation, state and local agencies played a critical role in the enforcement of violations of the Fair Housing Act. Section 810(c) of the 1968 legislation required HUD to refer all complaints of housing discrimination to state and local agencies whenever state or local law provided rights and remedies which were "substantially equivalent" to those accorded by the federal statute.[79] After complaints were referred to state or local agencies, the Secretary could not take any further actions except in extraordinary cases where HUD certified that the protection of the rights of the parties required further actions by the Secretary.[80]

If the Secretary, or in the case of referrals, the state or local agency was unable to secure voluntary compliance with the Fair Housing Act within 30 days after an administrative complaint was filed, section 810(d) allowed the aggrieved party to commence a civil action in a United States district court.[81] However, persons aggrieved of violations of the federal statute could not file a federal civil action if the applicable statel or local statute provided substantially equivalent rights and remedies.[82] In that event, the aggrieved individual was limited to a state or local forum. If a state or local law did not preempt the federal proceeding, an action under section 810(c) could be brought in federal court irrespective of the amount in controversy.[83]

3. Civil Actions In District Court

Under the 1968 Act, a person aggrieved by a violation of the Fair Housing Act could file an administrative complaint with HUD (or, if appropriate, with a certified state of local agency) under Section 810 and thereafter file a civil action if the administrative complaint was not resolved. If the aggrieved party did not wish to pursue an administrative remedy under Section 810, a separate provision, Section 812, allowed aggrieved individuals to file an action directly in the United States District Court. (It should be noted that the private action in district court created by Section 812 could be maintained without resorting to the administrative mechanism established by Section 810.)[84] Civil actions had to be filed within 180 days following the alleged act of discrimination.[85] Even when civil actions under section 812 were otherwise appropriate, the district courts were required to delay proceedings in any case in which it appeared that administrative conciliation efforts were likely to be successful.[86] Section 812 also vested district courts with the discretion to appoint attorneys for plaintiffs and to commence actions without the payment of costs upon a showing that the plaintiff could not afford attorney fees and costs.

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[76] Id.

[77] Id. §811(e).

[78] Id. §811(g).

[79] Id. §810(c).

[80] Id.

[81] Id. §810(d).

[82] Id.

[83] Id.

One of the most criticized features of the original legislation concerned the limitations on the relief available to prevailing plaintiffs. Section 812(c) limited the relief available to injunctive relief, actual damages, and not more than $1,000 in punitive damages.[87] An award of attorney fees and costs was available only where the court determined that the plaintiff was not able to pay his or her own attorney fees and costs.

The Attorney General was authorized to initiate enforcement actions in certain types of cases. Section 813 of the 1968 Act authorized the Attorney General to file civil actions in pattern and practice cases as well as cases which raised issues of general public importance.[88] Damage awards were not available in actions brought under this section. Pattern and practice was construed to mean discriminatory policies or practices which affected groups or classes rather than isolated episodes which affected individuals.

C. Enforcement Activities Under The 1968 Act

Shortly after the enactment of the 1968 Act, the Justice Department established a section consisting of approximately 30 individuals within the Civil Rights Division which was responsible for pursuing Fair Housing Enforcement actions. During the 12-year period beginning in 1968 and ending in 1980, a total of only 300 suits were filed by the Justice Department.[89]

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[84] Id. §812.

[85] Id. §812(a).

[86] Id.

[87] Id. §812(c).

[88] Id. §813(a).

[89] J. Kushner, Fair Housing, §10.01 (1984).

During the early years of the Reagan Administration, the Department did not file any cases and in 1987 the Department filed only 17 cases.[90]

In the years following the enactment of the Fair Housing Act, hundreds of private actions were adjudicated and a body of case law interpreting various aspects of the Fair Housing Act was developed.[91] Despite these activities, advocates of Fair Housing became increasingly disenchanted with the barriers imposed by the lack of any meaningful enforcement authority at HUD and the severe limitations on the relief available to prevailing plaintiffs.[92] Congress eventually responded to the growing dissatisfaction with enforcement provisions of the 1968 Act when Committee hearings were commenced in 1978 on bills which sought to enhance HUD's enforcement powers.[93]

In 1980, H.R. 5200, a bill which contained many of the basic features of the 1988 Amendments Act, was introduced in the House.[94] The House passed H.R. 5200 by a vote of 310-95 on June 12, 1980.[95] The Senate later attempted to pass H.R. 5200, but failed by a vote of 54-43 to obtain the 60 percent needed to end the filibuster that blocked the bill.[96] During the next 6 years, several bills similar to H.R. 5200 were introduced, but none progressed beyond the hearing stage.[97] The Reagan Administration opposed these bills and offered several counterproposals.[98] This impasse was finally broken by the introduction of what eventually became the Fair Housing Amendments of 1988.

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[90] Kushner, *An Unfinished Agenda: The Federal Fair Housing Enforcement Effort*, 6 Yale L. & Pub. Pol'y Rev. 348 (1988).

[91] See generally, Schwemm, Housing Discrimination (1990); Kushner, Fair Housing (1983).

[92] See e.g., Kushner, *An Unfinished Agenda: The Federal Fair Housing Enforcement Effort*, 6 Yale L. & Pub. Pol'y Rev. 348 (1988); Schwemm, Private Enforcement and the Fair Housing Act, 6 Yale L. & Pub. Pol'y Rev. 375 (1988).

[93] Federal Government's Role in the Achievement of Equal Opportunity in Housing: Hearings before the Civil Rights Oversight Subcommittee of the House Committee on the Judiciary, 92nd Cong., 1st and 2nd Sess. (1972).

[94] H.R. 5200, 96th Cong. 2nd Sess. (1980).

[95] 126 Cong. Rec. 14,478 (1980). The House report on this bill was H.R. Rep. No. 865, 96th Cong., 2nd Sess. (1980). The House committee hearings can be found in Fair Housing Amendments Act of 1979: Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary on H.R. 2540, 96th Cong., 1st Sess. (1979).

[96] See 126 Cong. Rec. 31, 699, 32,989 (1980).

[97] S.570 and H.R. 1973, 97th Cong., 1st Sess. (1981); S.1220 and H.R. 3482, 98th Cong., 1st Sess. (1983); S.2040 and H.R. 4119, 99th Cong., 2nd Sess. (1986). Coverage of familial status discrimination appeared for the first time in the 1983 bills, S.1220 and H.R. 3482.

[98] See e.g., S.1612 and H.R. 3747, 98th Cong., 1st Sess. (1983) and S.2146, 99th Cong., 1st Sess. (1985).

III. The 1988 Amendments to the Fair Housing Act

The provisions of the Fair Housing Amendments of 1988 fall into three major categories: those related to enhanced methods of enforcement; others designed to provide equal housing opportunities for the handicapped; and those designed to provide such opportunities for families with children. A new enforcement mechanism consists of an administrative enforcement procedure and an improved system which authorizes civil actions by private parties and the Attorney General. There is also an election provision which allows either of the parties to opt to have the action heard in federal district court or through administrative proceedings.

Administrative hearings are to be held in accordance with the Administrative Procedure Act, and the presentation of evidence is governed by the Federal Rules of Evidence. The Administrative Law Judge is empowered, upon finding a respondent guilty of discriminatory housing practices, to impose a civil penalty against a defendant of up to $10,000 for the first offense, $25,000 if there has been a prior violation within 5 years, and $50,000 if there have been two or more violations within the prior 7 years. Decisions of the ALJ are subject to review by the Secretary. All final decisions are subject to appellate review in the Circuit Court of Appeals provided that a petition for review is filed within 45 days of the issuance of the ALJ's order.

The private right of action that existed prior to the 1988 Amendments is continued with the addition of provisions intended to lessen the burden of the complainant in these actions. The statute of limitations is lengthened to 2 years, the complainant is not required to exhaust administrative remedies before filing in court and courts are empowered to appoint an attorney for either party upon a showing of need. The remedies established by the prior law are continued, but the $1000 cap on punitive damages has been removed, and the court is authorized to award attorney's fees and costs.

As in the 1968 legislation, the Attorney General is authorized by the 1988 Amendments to initiate civil actions in both "pattern and practice" cases as well as cases in which an issue of general public importance is involved. The court may award the relief that was available under the previous statute as well as civil penalties of up to $50,000 for the first violation and $100,000 for any subsequent violations. These penalties are not automatic and must be tailored as justice requires.

New provisions were added to protect handicapped persons from discriminatory housing practices. These provisions are designed to target practices covered by the prior statute as well as additional practices which are relevant only to handicapped persons. Practices rendered illegal by the

Amendments include the refusal to permit reasonable modifications to dwellings to facilitate handicapped access, the refusal to make reasonable modifications to rules such that the use of housing facilities by handicapped persons may be aided, and the creation of accessibility requirements for some structures to eliminate architectural barriers. state and local laws which impose accessibility requirements stricter than those called for by the Amendments are to remain in force.

The Act also includes provisions which were added to protect families with children from discriminatory housing practices. This population is afforded protection from the same types of housing discrimination prohibited by the Fair Housing Act of 1968. Notably, housing established for the elderly is exempted from these protections, whether privately constructed or financed pursuant to a state or federal program. Like the provisions related to handicapped persons, state and local regulations protecting families with children which are stricter than those contained in the 1988 Amendments are to remain in effect.

A. The Legislative History of the 1988 Amendments

The passage and approval of the Fair Housing Act Amendments of 1988[99] on September 13, 1988, represented the completion of an effort begun 8 years earlier; an effort to fulfill the "empty promise" of fair housing offered by the Fair Housing Act of 1968.[100] The bill which became the 1988 Amendments, H.R. 1158, was introduced on February 19, 1987, by Representatives Fish of New York and Edwards of California.[101] The provisions of H.R. 1158 were similar to those of H.R. 5200, the Fair Housing Amendments Act of 1980, which was also introduced by Representatives Fish and Edwards.[102] H.R. 5200, which provided for enhanced administrative enforcement and expanded protection to handicapped persons, was approved by the House of Representatives by a vote of 310-95, but failed to pass the Senate.[103]

H.R. 5200 was itself the product of a long process beginning in the 92nd Congress with a series of oversight hearings on equal opportunity in housing.[104] These hearings resulted in the introduction of a series of bills in the 95th and 96th Congresses on which extensive hearings were held.[105] Like H.R. 1158 the earlier bills evinced a desire by Congress to improve the enforcement mechanism of the Fair Housing Act. Characteristic of these efforts were administrative enforcement mechanisms similar to those contained in H.R. 1158, or grants of authority to the Department of Housing and Urban Development and the Department of Justice to sue on behalf of individual complainants.[106] H.R. 4119, a bill embodying these improved enforcement devices, was introduced by Representatives Fish and Edwards in the 99th Congress and was the subject of two hearings before the Subcommittee on Civil and Constitutional Rights,[107] but no further action was taken at that time.

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[99] Pub. L. No. 100-430, 1988, U.S. Code Cong. & Admin. News (102 stat. 1619) (42 U.S.C. §3601 et seq.).

[100] 134 Cong. Rec. , S-10454 (daily ed. August 1, 1988) (Statement of Sen. Kennedy).

[101] "Fair Housing Act Amendments Act o 1987," Hearing's before the Subcommittee on Civil Rights and Constitutional Rights of the House Committee on the Judiciary, 100th Cong., 1st Sess., Serial No. 9 (Hereinafter 1987 Subcommittee Hearings).

[102] See House Report No. 100-711, P. 14, Cong. Rec. Vol. 134 (1988).

[103] Id.

In the 100th Congress, the Subcommittee on Civil and Constitutional Rights held extensive hearings on H.R. 1158. An identical bill, S.558, was introduced in the Senate by Senators Kennedy and Specter.[108] Like the earlier bills, H.R. 1158 and S.558 created an improved administrative enforcement mechanism and extended Title VIII's protection to handicapped persons and families with children.[109] On March 3, 1988, the Subcommittee ordered to the Committee H.R. 1158, as amended, and on April 27, by a 26-9 vote, ordered H.R. 1158 reported favorably to the House of Representatives.[110] The bill passed the House on June 29 and the Senate on August 2. It was approved on September 13, 1988. The preeminent purpose of H.R. 1158 was the creation of an effective enforcement system that would provide some muscle to the Fair Housing Act, a statute which, without effective enforcement provisions, had been little more than a "toothless tiger."[111] The enforcement provisions of the bill were comprised of an administrative enforcement system, subject to judicial review and separate provisions authorizing district court actions by private litigants and the Department of Justice.[112] The second and third purposes of the Act, were, respectively, the extension of antidiscrimination protections to handicapped individuals and to families with children.

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[104] Id.

[105] Id.

[106] See e.g., H.R. 5143, 99th Congress, introduced by Mr. Sensenbrenner, and H.R. 4425, 100th Congress, introduced by Mr. Michael.

[107] House Report No. 100-711, P. 14, Cong. Rec. Vol. 134 (1988).

[108] On June 27, 1987, the Senate Judiciary Committee on the Constitution ordered reported S.558, as amended, for consideration by the full committee. S.558 as ordered reported is substantially the same as H.R. 1158, as reported.

[109] House Report No 100-711, P. 14, Cong. Rec. Vol. 134 (1988).

[110] House Report No. 100-711, P. 15, Cong. Rec. Vol. 134 (1988).

[111] 134 Cong. Rec., S-10454 (daily ed. August 1, 1988) (Statement of Sen. Kennedy).

[112] House Report No. 100-711, P. 13, Cong. Rec. Vol. 134 (1988).

As the long history of bipartisan attempts to amend the Fair Housing Act suggests, Congress has long recognized the need for sturdier enforcement tools in the context of discriminatory housing practices.[113] Given the long-standing consensus regarding the detrimental effects of discriminatory housing practices, the fact that it took Congress more than 8 years to pass the Fair Housing Amendments requires some explanation. To that end, it will be useful to discuss some of the obstacles to the passage of the Amendments.

The proposed expansion of the groups protected by the Fair Housing Act created some dissension. Although the inclusion of handicapped persons seemed desirable, it soon became clear that to some legislators, just how desirable it was depended upon the definition of handicapped.[114] A compromise was eventually reached, which would allow "handicapped" to be defined to include for example, individuals infected with the HIV or AIDS virus, but not individuals whose current substance abuse-addiction posed a threat to others.[115] Similarly, the inclusion of families with children disturbed a few legislators who anticipated a dilution of effective enforcement of Fair Housing claims due to the sizable increase in the number of claims inclusion of this group would likely generate.[116]

However, one of the most significant problems facing the enactment of the 1988 Amendments was the debate regarding the constitutionality of the administrative enforcement provisions. The earliest efforts to draft new enforcement procedures were crippled over concern that proceedings before an administrative law judge would deny the Seventh Amendment right to a jury trial.[117]

This concern was in part based upon the Supreme Court's holding in Curtis v. Loether[118], a case in which the court held that fair housing claims brought under Title VIII gave rise to the right to a jury trial as guaranteed by the Seventh Amendment. Following Curtis, in 1978, Professor Walter Gelhorn of Columbia Law School contended in a letter to the Judiciary Committee Counsel that shifting adjudicatory powers from the judiciary to ALJs would likely precipitate constitutional challenges, and that these challenges would have a significant likelihood of success.[119]

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[113] Id. at 15-16.

[114] Id. at 82.

[115] Pub. L. No. 100-430, 1988, U.S. Code Cong. & Admin. News (102 stat. 1619) (42 U.S.C. §3601 et seq.), §802(h)1, (h)3.

[116] Id. at 82. To some extent, these fears have been borne out. See pp. 55-57, infra.

[117] Id. at 69. An enlightening summary of the various legal issues surrounding the denial of a jury trial where remedies are to be sought through administrative enforcement procedures can be found at page 69, House Report No. 100-711, U.S. Congress and Administrative News, 110th Congress, second session 1988, P. 2206.

[118] 415 U.S. 189 (1974).

However, a subsequent Supreme Court opinion, Atlas Roofing v. Occupational Safety and Health Review Commission,[120]seemed to lend support to the contention that complaints lodged under the Fair Housing Act could be adjudicated administratively without violating the Seventh Amendment right to a jury trial. The Atlas Roofing holding created some ambiguity regarding the extent to which Congress could assign matters to ALJs without impinging upon Seventh Amendment jury trial rights. Atlas Roofing held that a jury is not required at the administrative level, particularly when the matter was limited to an initial adjudication.[121] What is more, the Supreme Court in Atlas Roofing explained that government actions to enforce public rights, such as those created by safety regulations, could be adjudicated in administrative proceedings without a jury, but the adjudication of private rights would trigger Seventh Amendment protection.[122] The Atlas Roofing decision's ambiguity stemmed from the difficulty in defining a "public right."

In the case of the 1988 Amendments to the Fair Housing Act, some legislators believed that the rights asserted by complainants were "public," while many, like Senator Orin Hatch of Utah, were "convinced that claims under [the act] remain private in nature."[123] Indeed, John Knapp, former general counsel for HUD, maintained that "when you read[a] case's description of what are private rights and public rights,private rights being reserved to [the judiciary], and if you lay that alongside the Supreme Court's decision in Curtis v. Loether, which I think is the case which determines that a Fair Housing Act damage case invokes the constitutional right to a jury trial, I think you get a somewhat fuzzy picture."[124]

To a large extent, the applicability of the Seventh Amendment to claims such as those which would arise from the 1988 Amendments was determined by the Supreme Court's decision in Tull v. U.S.[125], where the court determined that an Environmental Protection Agency enforcement action in federal district court fell within the aegis of the Seventh Amendment. Tull premised the Seventh Amendment jury trial right upon the nature of both the action and the remedy in question.[126] An action seeking the recovery of civil damages, according to Tull, is an "action in debt requiring a trial by jury."[127] Similarly, the court characterized civil penalties as the type "that could only be enforced in courts of law."[128] In light of Tull, section 812(g) of the Fair Housing Act, which empowers ALJ's to order civil penalties as well as unlimited actual and punitive damages, seemed in genuine peril of being held unconstitutional. And yet, in light of the ruling in Atlas Roofing, it seems that the Seventh Amendment concern may have been somewhat overstated. In any event, it is clear that the concern surrounding the jury trial question posed a formidable obstacle to the passage of the Amendments.

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[119] House Report No. 100-711, U.S. Congress and Administrative News, 100th Congress, Second Session, 1988, p. 2209.

[120] 430 U.S. 442 (1977).

[121] 134 Cong. Rec., S-10461 (daily ed., August 1, 1988) (Statement of Sen. Hatch).

[122] Id.

[123] Id.

[124] House Report No. 100-711, U.S. Congress and Administrative News, 100th Congress, Second Session, 1988, p. 2208, citing Fair Housing Amendments Act hearing before the subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives 83-84 (1986).

[125] 107 S.Ct 1831 (1987).

This stumbling block was finally surmounted by a compromise "single handedly forged" by the bill's co-sponsor, Representative Fish.[129] The Fish amendment, which established an election provision that allows the parties to elect to proceed before an administrative law judge or to secure a forum in a district court, appeased representatives who opposed the bill on Seventh Amendment grounds[130] and effectively eliminated any remaining questions concerning the constitutionality of the proposed Amendments.[131] Moreover, the compromise was deemed not to have weakened the bill in any way, but to have in fact strengthened it by adding flexibility in the choice of forums and immunizing it from constitutional challenge.[132] As a direct result of the Fish amendment, H.R. 1158 passed the House of Representatives on June 29, 1988, by a vote of 376-23.[133]

On August 1, 1988, the Senate commenced its debate of H.R. 1158.[134] Although certain aspects of the bill were aimed at adding new groups to the protections accorded by Title VIII, it was clear from the discussion on the Senate floor that the bill was enacted primarily as a result of an effort to strengthen the enforcement provisions of the existing Act.[135] The impediments to passage in the Senate had, in large part, been alleviated by resolution in the

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[126] Id. at 1836.

[127] Id.

[128] Id. at 1838.

[129] 134 Cong. Rec., H-4677 (daily ed. June 23, 1988) (Statement of Rep. Michael).

[130] 134 Cong. Rec., H-4677 (daily ed. June 23, 1988) (Statement of Rep. Sensenbrenner).

[131] 134 Cong. Rec., H-4677 (daily ed. June 23, 1988) (Statement of Rep. Edwards).

[132] Id.

[133] Memorandum of Senators Specter and Kennedy regarding their substitute amendment, 134 Cong. Rec., S-10455 (daily ed. August 1, 1988).

[134] 134 Cong. Rec., S-10454 (daily ed. August 1, 1988) (Statement of Senator Kennedy).

[135] 134 Cong. Rec., S-10454 (daily ed. August 1, 1988) (Statement of Senator Kennedy).

House of points of contention such as who exactly was to be included in the definition of "handicapped".[136] Most notable among these was the Fish amendment to the enforcement provision which was characterized in the Senate debates as the "key compromise in this legislation."[137] As a result of the Fish amendments, the Senate offered only minor changes to H.R. 1158. It was passed as amended on August 2, 1988.

B. The Enforcement Provisions Of The 1988 Amendments

The most significant changes effectuated by the 1988 Amendments consisted of the addition of two new protected groups and a significantly enhanced administrative and judicial enforcement mechanism. After 20 years with almost no enforcement authority, HUD now has what is likely the most comprehensive civil enforcement mechanism of any of the various federal agencies that have Civil Rights enforcement responsibilities.

1. Administrative Investigations

Section 810(a) requires the Secretary to initiate investigations after the receipt of a complaint alleging a discriminatory housing practice. HUD is also authorized to commence investigations on its own initiative. Complaints must be filed within 1 year after the alleged act of discrimination occurred or terminated. This represents a doubling of the 180-day time period which was allowed prior to the enactment of the 1988 Amendments.

When a complaint is filed, the statute requires the Secretary to notify the complainant that the complaint has been received. Furthermore, the party against whom the allegations are made must be advised that a complaint has been filed and informed of its rights under the statute, including its right to file an answer and to a choice of forums in which to proceed. The Secretary is required to complete the investigation within 100 days unless it is impractical to do so. If an investigation is not completed within the time period prescribed by the statute, the Secretary is required to issue a written explanation for the delay. Section 810(b) continues the conciliation features of the preexisting law. As in the original legislation, conciliation and voluntary settlement are encouraged by the 1988 Amendments. The relevant statutory provision specifically directs the Secretary to endeavor, "to the extent feasible," to engage in conciliation efforts.[138] Any settlement which the parties reach through the conciliation process must be approved by the Secretary. As an adjunct to the conciliation process, the parties may agree to submit their dispute to binding arbitration.

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[136] Pub. L. No. 100-430, 1988, U.S. Code Cong. & Admin. News (102 stat. 1619) (42 U.S.C. §3601 et. seq.), §802(h)1, (h)3.

[137] 134 Cong. Rec., S-10454 (daily ed. August 1, 1988) (Statement of Senator Kennedy).

Section 810(e), which provides for prompt judicial action, authorizes the Secretary to initiate proceedings for temporary relief when the Secretary determines that interim relief is necessary during the pendency of the administrative proceedings. This would allow, for example, an action to secure a preliminary injunction prohibiting the sale or rental of the premises involved in the alleged act of discrimination pending the resolution of the dispute.[139]

2. Referrals To State And Local Agencies

Section 810(f) provides for the certification of State and local agencies and for the referral of complaints to such agencies. Regulations implementing section 810(f) are set forth in 29 CFR Part 115. The 1988 Amendments anticipate that State and local agencies will continue to play the integral role in handling discrimination complaints that they had under the original legislation. State and local agencies are eligible for certification if the rights, procedures, and remedies available under the State or local laws are "substantially equivalent" to those available under the federal Fair Housing Act. Complaints made in locations which have a certified local agency must be referred by the Secretary to the local agency. Once the referral is made, the Secretary cannot take any further actions unless: (1) the local agency fails to take any actions on the referral within 30 days after receipt of the complaint; (2) the agency fails to proceed with reasonable promptness; or (3) the Secretary determines that the agency no longer qualifies for the "substantially equivalent" certification.

At the time of the adoption of the 1988 Amendments, there were 36 State and 76 local agencies which had obtained certification under the then existing federal authorization. These state and local agencies were allowed to retain their certified status for a period of 40 months, (with provisions for a possible 8-month extension) to allow for any modifications which might be required by the 1988 Amendments. The Secretary is also required to review certifications of local agencies every 5 years. To the extent local agencies are not equipped or authorized to process complaints alleging discrimination on the basis of the new categories added by the 1988 Amendments (discrimination on basis of handicap or familial status), jurisdiction over complaints falling in these new categories has been retained by HUD.

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[138] The Fair Housing Amendments Act of 1988, §810(b)(1), 42 U.S.C. 3601-3619 (1988).

[139] Id. at §810(e) (1).

Regulations governing the standards and procedures for equivalency certifications are contained in 24 CFR Part 115. The regulations require HUD to determine that the state or local Fair Housing law under which the locality operates is, on its face, equivalent to the federal Fair Housing law with respect to the rights and procedures that are available to claimants. The regulations also require HUD to determine that the actual practices and procedures utilized by the locality are the same at those established by the federal statute.[140] The regulations establish specific criteria which each locality must satisfy to secure an equivalency certification. Under these criteria, the locality must have a enforcement mechanism which provides for the filing and investigation of complaints within the 100-day time period prescribed by the federal statute. If an investigation results in a finding that a violation has occurred, the parties must be given a choice of forums in which to proceed and the adjudicatory mechanisms must be the same as those that are available under the federal statute. Thus, as in the case of federal Fair Housing complaints, complainants and respondents in State and local proceedings must be provided with an administrative or judicial forum for the resolution of complaints which proceed beyond the investigatory stage.

The local administrative agency must also have the authority to issue subpoenas and to secure prompt judicial action to maintain the status quo during the pendency of the proceeding. The relief available to prevailing complainants must be the same as that which is available under the federal statute. In addition, judicial review of agency orders must be available to the parties to an administrative proceeding.[141] In addition to setting substantive equivalency standards, the regulations also create a procedure for securing certifications of equivalency.[142] These provisions require the submission of requests for certifications to the Assistant Secretary for Fair Housing and they establish a procedure for consideration of requests for certifications. Other provisions of Part 115 govern denials of requests for certifications; withdrawal of certifications; conferences; and interim referrals.[143]

As will be discussed in greater detail below, problems have emerged with certifications of state and local agencies which were grandfathered under section 810(f). The vast majority of these agencies did not achieve equivalency status by January 13, 1992, the date by which equivalency was to be secured. Several of these agencies have been extended for an additional 8-month period but seems likely that many will not achieve equivalency by the expiration of that period.

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[140] 24 CFR §115.2.

[141] 24 CFR §115.3.

[142] 24 CFR §§115.5 and 115.6

[143] 24 CFR §§115.7, 115.8 and 115.9.

3. Determinations of Cause

The Secretary is required by Section 810(g) of the 1988 Amendments to conclude all investigations within 100 days. If reasonable cause to believe that a violation has occurred is found, the Secretary is required to issue a formal charge of discrimination. If reasonable cause is not found, the complaint must be dismissed and HUD is required to issue a public notification of the dismissal.[144] If the Secretary is unable to complete the investigation within 100 days, he must advise the parties in writing of the reasons for his failure to comply with the 100-day completion requirement.

Section 811 gives the Secretary the authority to issue subpoenas and to order discovery to the same extent the federal courts are allowed to do so under the Federal Rules of Civil Procedure. Failure to comply with subpoenas or discovery orders may subject noncomplying parties to fines of up to $100 and confinement in prison for a period of 1 year.

Under section 812, after a formal charge is issued, a complainant or a respondent may elect to have the claim adjudicated in civil action in a United States District Court in lieu of the administrative proceeding before an ALJ. Any party desiring to make this election must do so within 20 days after receipt of the formal charge. If one of the parties invokes the election provision, the action is prosecuted by the Attorney General on the Secretary's behalf. The aggrieved individual may intervene as a party to the civil action.[145]

4. Administrative Hearings

When the Secretary determines that there is reasonable cause to conclude that a violation has occurred and a formal charge has been issued pursuant to section 810(a), an Administrative Law Judge is required under Section 810(a) to conduct an adjudicatory hearing pursuant to the provisions of the

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[144] There are no express statutory or regulatory provisions for review of "no cause" determinations. A complainant may arguably be able to seek judicial review under the Administrative Procedure Act as a person aggrieved by final agency action. 5 U.S.C. §704. However, it seems likely that a "no cause" decision would be deemed a nonreviewable exercise of prosecutorial discretion.

[145] Regulations implementing the handling and processing of complaints of housing discrimination are codified at 24 CFR Part 103. The regulations state, albeit in greater detail, the obligations established by the 1988 Amendments. Subpart A sets forth some general definitions. Subpart B establishes procedures for the actual filing of complaints. Subpart C provides for referrals to state and local agencies in referral jurisdictions. Subpart D sets forth the procedures to be followed in the investigation of complaints. Subpart E governs the conciliation process and subpart F governs the issuance of formal charges. Subpart H governs certain miscellaneous procedures.

Administrative Procedure Act[146] except where the parties elect to proceed in a United States District Court. When the formal charge is issued, Section 810(b) requires the ALJ to notify the parties of the pendency of the charge and to designate the time and place of the hearing.

Section 810(c) mandates that the provisions of the Administrative Procedure Act govern the hearing. The presentation and receipt of evidence are governed by the Federal Rules of Evidence. Section 810(d) requires the adjudicatory proceedings to be as expeditious as practicable and that discovery and the hearing process are to be inexpensive. The parties to the hearings are HUD, which is represented by its Office of General Counsel and the respondent. The aggrieved individual may intervene as a party to the proceeding and secure representation by private counsel. The parties are entitled to engage in discovery on an expedited basis. Furthermore, although the Federal Rules of Evidence govern the presentation of testimony and documentary evidence, section 810(d) indicates that the proceedings are to be slightly less formal than a trial in a federal district court.

Section 810(c) requires the consent of the charging party to any settlements which may be negotiated prior to the conclusion of the formal hearing. If a civil action is filed in a United States District Court, section 810(f) requires the termination of the administrative proceeding. Section 810(g) states that administrative hearings must commence within 120 days after the charge has been issued and that the decision must be issued by the ALJ within 60 days after the conclusion of the hearing. The ALJ's decision must include findings of fact and conclusions of law.

Part 104 of the applicable regulations (24 CFR Part 104) govern the conduct of administrative hearings. The regulations provide for a full-blown evidentiary hearing at which the parties may be represented by counsel; where evidence is introduced and witnesses are examined and cross-examined. Subpart D provides for the filing of pleadings and motions. Subpart D also governs prehearing discovery. Discovery may be secured through interrogatories, depositions, requests for the production of documents and requests for admissions. Subpart D also provides for sanctions in the event either party fails to cooperate during the discovery phase of the proceedings.

Subpart F provides for a final prehearing conference. As is the practice in most federal district courts, the parties to an administrative proceeding under the Fair Housing Act must submit pretrial statements which contain a summary of their legal positions and designates the witnesses and evidence that will be presented during the hearing. Subpart H of the regulations sets forth the procedures which apply to the actual hearings. The hearing rules follow the procedures used in civil actions in district courts. Subpart I provides for the issuance of final decisions after the conclusion of the evidentiary hearing. Subpart J sets forth procedures for securing judicial review and enforcement of final agency decisions.

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[146] 5 U.S.C. §§554 et seq.

5. The Relief Available to Prevailing Parties

Another major change effected by the 1988 Amendments involved a considerable expansion of the relief that is available to prevailing parties. If the hearing results in a determination that the charging party was the victim of an unlawful discrimination, Section 812(g) authorizes the ALJ to award compensatory damages, injunctive and other equitable relief and to impose civil penalties. The civil penalties may include a fine of up to $10,000 in the case of first time violators; $25,000 if there has been a previous violation by the same individual within a 5-year period; and $50,000 if there have been two or more violations by the same individual within the preceding 7 years. Section 812(o) also allows ALJs and courts to award attorney fees and costs to the prevailing party unless the prevailing party is the United States. If a bona-fide purchaser or renter does not have actual notice of the proceedings, section 812(g)(4) states that the relief awarded may not affect the sale, lease or encumbrance of the premises. If a violation is found, the Secretary is obligated by section 812(g) (5) to transmit a copy of the ALJ's decision to the appropriate state or local licensing authority.

The Secretary is authorized by section 812(h)(1) to review any finding issued by an ALJ.[147] The review must be completed within 30 days or the ALJ's order becomes final and binding. The Secretary is also required to notify the parties of whatever final decision is reached. The Secretary's review is discretionary. There are no statutory or regulatory provisions which authorize either the complainant or the respondent to petition for the Secretary's review of a decision issued by an ALJ. The applicable regulations provide that review by the Secretary will be reserved for extraordinary cases such as those with a potential impact beyond the parties to the immediate proceeding.[148]

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[147] This review will be exercised at the secretary's discretion, most likely in only those cases of high public impact. See Caruso and Jones, *Fair Housing Act Matrix 1968-1988* with Comments, 22 J. MARSHALL L. REV. 449, 514 (1989).

[148] While there are no formal provisions for allowing the parties to a proceeding to secure review, HUD indicates that it has upon written requests by counsel, initiated review by the Secretary. Interview with Alan Heifetz. April 7, 1992.

6. Judicial Review of Administrative Decisions

Decisions issued by ALJs are decreed by section 812(i) to be final agency action and are reviewable directly in the United States Court of Appeals for the Circuit in which the violation occurred. A petition for review in the Court of Appeals must be filed within 30 days after the final HUD decision is entered. Judicial review of ALJ decisions is governed by 28 U.S.C. §§2341 et seq.which governs review of orders of federal agencies. The scope of review is governed by the substantial evidence standard.[149]

The ALJ's decision becomes final and binding 45 days after its issuance unless one of the parties petitions for judicial review in the Court of Appeals. Enforcement of the Secretary's decision is vested in the United States Court of Appeals for the Circuit in which the violation occurred. Enforcement petitions may be filed by the Secretary or any person entitled to relief in the event the Secretary fails to petition for enforcement. Appellate review of agency decisions by a Circuit Court of Appeals is the most common form of judicial review of formal agency action in the federal system. This procedure was first utilized by the Federal Trade Commission Act of 1914 and has subsequently been adopted by virtually all federal regulatory agencies.[150]

Section 813 preserves and expands the private right of action that existed under the prior law. Thus, in lieu of pursuing an administrative proceeding, parties seeking redress of violations of the Fair Housing Act may file civil actions in a United States District Court. Parties who elect to proceed under §813 are not required to exhaust the administrative remedies prior to filing an action in District Court. However, an aggrieved person may not initiate a private action in district court if an administrative proceeding is pending. If an action is brought under section 813, a prevailing party may, in addition to compensatory and injunctive relief, also secure an award of punitive damages. Section 813 also allows the prevailing party to obtain an award of attorney fees and costs.

7. Actions By the Attorney General

Section 814 continues the authority of the Attorney General to initiate civil actions in pattern and practice cases and cases in which discriminatory practices raise an issue of general public importance. Section 813(a) allows the Attorney General to intervene as a party in private actions if such an action raises an issue of general public importance. Section 814 also authorizes the Attorney General to commence zoning and other land use cases and to initiate actions to enforce subpoenas and conciliation agreements.

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[149] *See, e.g.*, *Universal Camera v. NLRB*, 340 U.S. 474 (1951). The Court in *Universal Camera* defined subtantial evidence to be "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." 340 U.S. at 477.

[150] Robinson, Gellhorn and Bruff, The Administrative Process, p. 331 (West 1987).

IV. HUD'S Implementation of the 1988 Amendments

A. 1989 Activities

Section 808e(2) of the Fair Housing Act requires the Secretary to submit an annual report to Congress which states the progress made towards reaching the goal of eliminating discrimination in housing. Among other things, the Secretary must report: the number of investigations that were not completed under section 810(a)(1)(B); the number of determinations which were not made in a timely manner under section 810(g) and the number of hearings not commenced or findings and conclusions not made as required by section 812(g).

The first annual report prepared pursuant to the 1988 Amendments was issued by the Secretary on September 12, 1990.[151] In this report, the Secretary concluded that the most significant accomplishments made during the first year of operation under the 1988 Amendments included the promulgation of comprehensive regulations; securing an operating budget; assigning duties to staff; revising complaint processing procedures; and initiating the process for the certification of state and local agencies as required by the 1988 Amendments.[152]

1. Organizational Structure: The Office of Fair Housing and Equal Opportunity

Overall responsibility for the administration of the Fair Housing Act was delegated to the Assistant Secretary for Fair Housing and Equal Opportunity. Responsibility for receipt, investigation and conciliation of complaints was delegated to the Directors of Fair Housing and Equal Opportunity at the 10 regional HUD offices. Oversight, guidance and responsibility for making recommendations concerning the certification of state and local agencies were retained by the Assistant Secretary and his staff at HUD headquarters in Washington.[153]

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[151] U.S. Department of Housing and Urban Development, Report to Congress Pursuant to §808(e)2 of the Fair Housing Act (1989).

[152] Id. at p. 4.

HUD's Office of General Counsel handles reasonable cause determinations; prosecutes charges in administrative proceedings; and requests the Justice Department to initiate actions in District Courts to secure prompt judicial relief in instances in which injunctive or other equitable relief is needed to maintain the status quo during the pendency of the administrative proceedings.[154]

2. The Office Of General Counsel

Fair Housing cases are handled by a section of the Office of the General Counsel which is headed by the Assistant General Counsel for Fair Housing. There are two Deputy Assistant General Counsels. One Deputy is in charge of enforcement activities. The other Deputy is responsible for legal opinions. In addition to the Assistant General Counsel and his 2 Deputies, there are 13 line attorneys, 2 paralegals and 2 clericals. The Assistant General Counsel is responsible for all of HUD's civil rights matters, but the bulk of the efforts of his office are devoted to Fair Housing enforcement matters. In addition to the staffing described above (which is housed at HUD headquarters in Washington), attorneys in each of the 10 regional offices handle Fair Housing matters. However, the amount of attorney time, like the caseload, varies from region to region.[155]

3. Operating Budget For FY 1988

The amount budgeted for fiscal year 1988 for the Fair Housing and Equal Opportunity (FHEO) headquarters and regional offices totalled $29,193,000. This supported 590 staff years, 169 of which were devoted to Fair Housing enforcement. In addition, $4,570,000 was requested in September 1988 in anticipation of the passage of the 1988 Amendments. This request was approved by the Office of Management and Budget but Congress was unable to act before it adjourned. HUD later requested and received approval to transfer $4,570,000 from other HUD activities. In FY 1989, a request for a supplemental appropriation of $3,490,000 was submitted and approved as part of the Supplemental Appropriations Act of 1989. Staffing for the increased responsibilities created by the 1988 Amendments began prior to the effective date of the Amendments (without an additional appropriation) in anticipation of the 1988 Amendments with the addition of 85 investigators in HUD's regional offices. FHEO reported in the 1989 Report that the 169 staff years expended during FY 1989 would grow to 309 staff years by 1990.[156]

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[153] Id.

[154] Id. The real world effects of this particular empowerment are notable, as the story of the first temporary restraining order (TRO) issued under the Fair Housing Amendments illustrates. The TRO was obtained on the behalf of a family of four who had found an apartment especially well suited to their needs (space, schools, budget, etc.) only to be told that the apartment was unavailable to families with children. When contacted by HUD, the owner refused to keep the apartment open or begin processing the family's application. HUD authorized a TRO in April 1989. In early May the respondents settled, allowing the family to move in and giving them 3 months' free rent. What is more, the respondents gave $400 to the housing center that assisted the family with its complaint (1989 Report P. 16-17).

[155] Interview with Harry L. Carey, Assistant General Counsel for Fair Housing, Office of General Counsel, U.S. Department of Housing and Urban Development, in Washington, DC (June 11, 1991).

During the first year of operation under the 1988 Amendments, HUD trained approximately 150 investigators in the new procedures created by the Amendments. The primary change at the investigatory level was a shift from an adversarial posture to that of a neutral fact-finder. HUD also developed a comprehensive technical guidance and memoranda system for investigators. An automated complaint-tracking system was developed in which information from the regional offices and information generated by HUD headquarters were integrated into a single computerized data base.[157]

4. Complaint Processing Procedures

After the 1988 Amendments became effective, the bulk of HUD's efforts were devoted to the development of a new complaint processing procedure to incorporate the alterations that were effectuated by the Amendments. The procedure which was ultimately developed commences with the receipt of a complaint alleging a violation of the Fair Housing Act at any of the 10 regional offices. The complaint is initially screened by a staff person who has been assigned intake responsibilities. At that point, a determination is made as to whether the complaint falls within HUD's jurisdiction.

Complaints barred by the statute of limitations or which do not allege a grievance which is redressable under the Fair Housing Act are closed administratively. Complaints are also closed at this stage when the complainant cannot be located; and when the complainant fails to cooperate with the investigation or other factors preclude further processing. Complaints which challenge the validity of local zoning or land use laws are referred to the Department of Justice.[158] Investigations which proceed beyond the initial screening stage are usually handled by a HUD regional office. Conciliation efforts are initiated in conjunction with the investigation by the individual assigned to conduct the investigation. If information needed for the investigation cannot be secured voluntarily, subpoenas and other discovery orders are issued in appropriate cases. If conciliation efforts prove successful, a settlement agreement is executed and the investigation is closed.

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[156] U.S. Department of Housing and Urban Development Report to Congress Pursuant to §808(e)2 of the Fair Housing Act (1989), at page 14.

[157] Id. at p. 10.

[158] Id. at p. 8.

If conciliation proves unsuccessful, a Final Investigation Report (FIR) is prepared which sets forth the investigator's findings and recommendations. During 1989, all FIRs were reviewed by the regional office and thereafter by FHEO headquarters in Washington. Completed FIRs were referred to the Office of General Counsel for a determination of whether sufficient cause existed to initiate an enforcement action. If the General Counsel concluded that adequate cause did not exist to justify the issuance of a formal charge, the complaint was dismissed. If the General Counsel made a determination that sufficient grounds existed, HUD issued a formal charge against the respondent.[159]

At this point, the charge is referred to the Office of Administrative Law Judges. Notification of the time and place for an administrative hearing before an ALJ is issued within 3 days after the formal charge issued. The parties have 20 days after receipt of the charge to elect to proceed in the United States District Court.[160] If an election is not made, the charge proceeds to a hearing before an ALJ. When the charge proceeds to a hearing, the Office of the General Counsel prosecutes the charge on behalf of the complainant. However, the complainant may intervene as a party to the proceeding and secure separate representation by his or her own counsel.

5. Enforcement by State and Local Agencies

When the 1988 Amendments became effective, HUD certified the existing state and local agencies under the grandfathering provisions of the Fair Housing Act.[161] At the time that the 1989 Report was issued HUD anticipated that these agencies would continue to handle all complaints alleging discrimination based on race, color, religion or national origin until January 13, 1992, the date by which they were required to achieve substantial equivalency. All complaints filed in jurisdictions covered by equivalent state or local Fair Housing Acts are processed whether filed with HUD or directly with the local agency and are counted in HUD's overall caseload. During 1989, six jurisdictions submitted new laws to HUD for certification. One was determined not to satisfy the equivalency requirements. Another, the State of

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[159] Id. at p. 10.

[160] Id.

[161] Id. at p. 11.

Texas, was given a provisional approval subject to the promulgation of the new Fair Housing regulations. The remaining four applications were still pending when HUD's 1989 report was issued. Federal support for state and local agencies was provided through the Fair Housing Assistance Program, which provides support for processing complaints, training programs, technical assistance, information systems and other enforcement activities. HUD allocated $5.8 million to the Fair Housing Assistance Program from its 1990 appropriation.[162]

During the 1989 fiscal year, HUD contracted with 25 states and local agencies to investigate and conciliate complaints alleging claims of handicap and familial status discrimination on HUD's behalf. These contractors were paid approximately $650 for each successful investigation and conciliation and $375 for each administrative closure.[163]

6. Complaints Processed In 1989

During 1989, a total of 7,174 Fair Housing complaints were filed. Of these, 3,952 fell within the HUD's jurisdiction. The remaining 3,222 fell under the jurisdictions of various states and local Fair Housing agencies. Three times as many complaints were filed with HUD in 1989 than were filed in the previous year. There was, however, no corresponding increase in the number of such complaints filed with state and local agencies.[164] A substantial portion of the increased caseload was attributable to complaints alleging discrimination based on handicap and family status.[165]

The vast majority of the complaints filed during 1989 at HUD (95%) were filed after the March 12, 1989, effective date of the 1988 Amendments. An average of 387 complaints were filed with HUD each month. During the preceding year, 1988, the average was only 83 complaints per month. More than half of the complaints (1,923) filed after the effective date of the 1988 Amendments asserted claims of discrimination based on familial status. The types of claims asserted in this category included improper exclusion of older persons; refusals to rent to families with children under a certain age; occupancy limits applied to children; and the exclusion of children from services provided to adults.

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[162] Id. at p. 12.

[163] Id.

[164] Id. at p. 18. HUD offers two probable reasons that state and local agencies experienced no substantial increase in complaints. First, the enforcement powers of state and local agencies were not directly strengthened by the 1988 Amendments. Second, state and local agencies actually lost jurisdiction over complaints which alleged discrimination based on more than one criteria (e.g., race and physical handicap). Notably, responses to an informal survey of state and local agencies conducted by the author suggests that the emphasis placed in employment discrimination claims may serve to diminish the attention granted claims of housing discrimination. See generally Letters from state and local agencies on file with author.

[165] Id. at p. 13.

During the same period, approximately one-third (1,309) of the complaints involved claims of race discrimination. The average number of such complaints filed on a monthly basis (135) represented a 50% increase over the previous year. Typical of the race claims were false denials concerning the availability of a rental unit, refusals to rent to inter-racial couples, and racial harassment. Approximately one-fifth of the complaints filed alleged handicap discrimination. The 713 complaints falling in this category included the application of "no pets" policies to guide dogs, refusals to install stairway lifts at the complainant's expense, refusals to permit group homes for handicapped persons and refusals to permit parking that would make apartments wheelchair accessible.

Four hundred ten of the 1989 complaints alleged sex discrimination. The remaining complaints alleged discrimination based on national origin, religion, or color. Fifty-three percent of the post-Amendment complaints (2,235) were open for more than the 100-day period allowed by the statute. Six hundred ninety-one of these were closed by the end of the year. As of December 31, 1989, however, 1, 544 complaints were pending that were more than 100 days old. HUD's 1989 report explains that the backlog was attributable to the amount of information gathering and analysis that is required to process complaints.

HUD reported more success with conciliations. During 1989, 862 cases were successfully conciliated representing a monthly average of 89. By contrast, in 1988, only 205 cases were successfully conciliated, representing a monthly average of 1 percent of the total number of complaints filed. Twenty-five percent of the 1989 conciliations resulted in housing for the complainants. Interim judicial relief was obtained by the Justice Department in eight cases.

During the first year of implementation, a relatively small number of cases were sent to the office of General Counsel for determinations of cause. As of December 31, 1989, the General Counsel had made cause determinations in 91 cases. Findings of cause to believe that a violation had occurred were made in only 19 of the 91 cases referred. Twenty of the remaining cases were dismissed after the General Counsel concluded that cause determinations were not warranted and two were carried over to the next fiscal year.

7. Complaints Handled By State And Local Agencies

In 1989, state and local agencies received 3,222 complaints of housing discrimination. This represents a less than 2% increase over the 3,167 that were filed in 1988. HUD believes that this relatively level caseload is attributable to the fact that there were no changes in State and local laws comparable to the changes that were effectuated by the 1988 Amendments to the federal Fair Housing Act. Furthermore, complaints alleging more than one category of discrimination (e.g., race and handicap status) which might in the past have been referred to a State or local agency could not be referred under the 1988 Amendments based on the new categories of coverage. (The Amendments established a retention requirement when complaints alleged discrimination in one or more of the newly-covered categories.)[166] State and local agencies closed 3,030 complaints in 1989. This represents an 8% decrease from the number of cases closed in 1988 (3,297). State and local agencies successfully conciliated 846 complaints during the 1989 reporting period.[167]

8. Administrative Hearings

The Office of Administrative Law Judges ("OALJ") is responsible for adjudicating charges of housing discrimination. OALJ staffing consists of four administrative law judges, two attorneys, a docket clerk, an office manager and a secretary. Cases are tracked on a computerized database. Although the bulk of OALJ efforts are devoted to adjudicating Fair Housing cases, it is also responsible for handling other types of hearings. These include contractor debarment hearings, mortgage review board hearings, mobile home construction hearings, personnel grievances, program fraud cases, miscellaneous disputes, and occasional nonHUD matters. The case load is growing and OALJ anticipates adding additional staff and judges in the near future. All cases are heard in the vicinities in which the complaints were filed.[168]

HUD reports that 21 charges were filed with the Office of Administrative Law Judges in 1989. Six of these involved claims based on race; four involved sex; thirteen asserted claims based on familial status and one involved a claim based on handicap. The claims arose in 11 states. By the end of 1989, the election period had run in 19 of the 21 cases. In 4 of the 19, the parties elected to litigate in district court. Two elections were made by respondents; two were made by complainants. The first administrative hearing was held in Atlanta, Georgia. The hearing was commenced 68 days after the charge was issued (120 days are allowed by the statute) and a decision was issued 45 days after the conclusion of the hearing.[169]

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[166] Id. at p. 19.

[167] Id. at p. 20; See also Exhibit 5-12 at p. 19.

[168] Interview by the author with Alan W. Heifetz, Chief Administrative Law Judge, Office of Administrative Law Judges, U.S. Department of Housing and Urban Development, Washington, DC (June 11, 1991). *See also* Memorandum for Alan W. Heifetz regarding the 1990 State of Fair Housing Report, on file with the author.

B. Changes And Developments In 1990

1. Cases Processed By The Office Of Administrative Law Judges In 1990

On January 1, 1990, 16 Fair Housing cases were pending in the Office of Administrative Law Judges.[170] During the 1990 calender year, 81 new cases were docketed. Out of the total cases processed by the OALJ in 1990, 62 elected to proceed in federal district courts. Forty-three elections were made by respondents and the remaining 15 were made by complainants. In four of the election cases, both parties requested the district court forum. Administrative hearings were held by OALJ in 14 cases. Decisions were issued in 13 of these cases. The other was carried over to 1991. Another case was withdrawn as a result of a decision issued in a state fair housing proceeding. Ten other cases were resolved with consent decrees. The 12 remaining OALJ cases were carried over to 1991. During 1990, all of the cases referred to OALJ were commenced within 120 days after the charges were issued. Ninety-two percent of the 13 decisions issued were concluded within 60 days following the hearings. In one instance, a decision was issued 2 days late because of word-processing difficulties.[171]

OALJ reports that cases are moving relatively smoothly. Most discovery disputes are resolved during telephone conferences. Pleadings and documents must be filed with OALJ in Washington, DC, but filings may be effectuated through mailings and by telefax. Another case-handling feature within OALJ involves the appointment in some cases of a settlement judge to facilitate prehearing settlements. If negotiations do not produce a settlement, a different ALJ is assigned to hear the case.

The Office of Administrative Law Judges recently reported continued success with its settlement program. Since the effective date of the 1988 Amendments, a total of 312 cases have been docketed at OALJ. Elections occurred in 189 (approximately 61%) of the cases. The parties in 123 cases opted to remain in the administrative process. With respect to these cases, final written decisions were issued in 34 cases. Six additional cases have been concluded and are pending the issuance of a final decision. With respect to settlements, 47 cases have settled, almost all with the assistance of OALJ's settlement process. Six additional cases are pending settlement. In the case of settlements, claimants have received a total of $373,529, which represents an average of roughly $8,000 per case. Settlements have ranged from as high as $60,000 to amounts as low as $500.[172]

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[169] U.S. Department of Housing and Urban Development, Report to Congress Pursuant to §808(e)(2) of the Fair Housing Act (1989) at p. 21.

[170] Interview by author of Alan Heifetz, June 11, 1991.

[171] Id.

2. Changes In Complaint Handling Procedures

In December 1990, the authority to make "no cause" determinations was delegated from the Office of General Counsel to the Assistant Secretary for Fair Housing. In January 1991, the authority to make cause determinations was delegated from the General Counsel's office in Washington to the regional attorneys in each of the 10 regional offices. This latter delegation was limited to cases involving claims of race, sex, or national origin discrimination. Thus, cause determinations in claims involving familial status or handicap discrimination must be approved by the Office of General Counsel in Washington. In addition, cases involving race, sex or national origin discrimination which raise unusual, complex, or novel legal issues are also reviewed and approved by the Office of General Counsel in Washington.[173]

The procedure for investigating complaints has not changed. All complaints are investigated by investigators at one of the 10 Regional offices. Each investigatory file is divided into three sections: an evidentiary section, a deliberative section and a section that contains the Final Investigative Report. All completed investigations are reviewed by supervisors at the regional office level and subsequently at FHEO headquarters in Washington DC (if the complaint involves familial status or handicap discrimination) for a final determination or cause.

3. Justice Department Activities

The Housing and Civil Enforcement Section of the Justice Department's Civil Rights Division is responsible for prosecuting Fair Housing cases in the various federal district courts. Some assistance is provided by local U.S. attorneys. Two other sections within the Civil Rights Division have some Fair Housing responsibilities. The Criminal Section prosecutes criminal violations and the Appellate Section handles civil and criminal appeals.

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[172] Interview by author of Alan Heifetz, April 7, 1992.

[173] Interview by author of Harry L. Carey, Assistant General Counsel for Fair Housing, Office of General Counsel, U.S. Department of Housing and Urban Development, in Washington DC (June 11, 1991).

The section consists of 32 attorneys, a mathematical statistician, 5 paralegals, a staff assistant, 8 secretaries, and 2 legal technicians. The Section is headed by a Section Chief and three Deputy Chiefs.[174] For the period from March 12, 1989, through June 10, 1991, the Justice Department handled 39 pattern and practice cases. In 18 of these cases, consent decrees were entered. A favorable judgment was entered after a trial in one pattern and practice case. Sixteen other pattern and practice cases are pending. Five zoning cases were filed after referral from HUD. A favorable judgement was entered in one zoning case. The remaining three zoning cases are still pending. Prompt judicial action was taken in 10 cases. The Justice Department intervened as a party in two private cases. In three other cases, the Department sought enforcement of HUD decisions in Circuit Courts of Appeals. In another civil action, the Department is seeking the enforcement of a conciliation agreement.

A total of 74 cases handled by the Justice Department were the result of elections made by parties to administrative proceedings. Within this group of cases, 47 involved claims of discrimination based on familial status. Seven other cases alleged handicap discrimination and the remaining 19 cases concerned claims of discrimination based on race, sex or national origin. The vast majority of the election cases (54) are still pending before various district courts. Consent decrees have been entered in 12 cases. Judgements have been entered in only three cases. One of these decisions was adverse to the United States and is now pending before the United States Court of Appeals for the Eighth Circuit. The Housing and Civil Enforcement Section is also representing HUD in five cases in which HUD was joined as a defendant. The Justice Department filed amicus briefs in 10 private cases.[175]

4. Complaint Processing In 1990

During the period which began on January 1, 1990, and ended on December 31, 1990, a total of 7,675 complaints were filed which alleged discriminatory housing practices. HUD handled 4,457 of these. The remaining 3,218 were handled by state and local agencies. The highest number of complaints were filed in Regions 5[176] (954) and 9[177] (808). As in the previous year, almost half (2056) of the complaints that were processed by

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[174] Interview by author of Paul Hancock, Chief of Housing and Enforcement, Civil Rights Division, U.S. Department of Justice, in Washington, D.C. (June 12, 1991). See also Justice Department Staffing Chart on file with author.

[175] Information derived from Justice Department database. A chart reflecting these figures is on file with author.

[176] This region covers Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin.

[177] This region covers California, Arizona, Nevada, Hawaii, Guam and American Samoa.

HUD alleged discrimination on the basis of familial status. The second highest category was race (1648). Another 1,088 alleged discrimination on the basis of handicap and 465 complaints alleged sex discrimination. Two hundred seventy-one complaints claimed discrimination on the basis of national origin. Another 149 were based on color. The remaining 72 complaints alleged religious discrimination.

During 1990, 1,740 complaints were closed by HUD. Conciliation efforts were successful in 1,709 cases. The Office of General Counsel made cause determinations in 80 cases. In 689 other cases, the Office of General Counsel concluded that there were not sufficient grounds to believe that an act of discrimination had occurred. During 1990, a total of 4485 cases were not processed within the 100-day period prescribed by the 1988 Amendments. However, 2640 of these were closed by the end of the year. Another 1,489 complaints were processed within the 100-day time period.[178]

V. The Status of Fair Housing Enforcement 2 Years After the Amendments

The 1988, Congress gave HUD a formidable weapon to aid in its efforts to eliminate discriminatory housing practices. The enforcement mechanism established by the 1988 Amendments reflects one of the fundamental principles of the administrative process. Congress has delegated a broad grant of authority to an agency that specializes in housing matters. The investigations and conciliations are conducted by experienced investigators who are well versed with the Fair Housing Act and regulations. When it created statutory deadlines for the completion of investigations and adjudications Congress intended to provide victims with an expeditious and inexpensive means for the resolution of their claims.

If the Secretary determines that cause exists to believe that the Fair Housing Act has been violated, a charge is issued that is forwarded to the Office of Administrative Law Judges. At that point either of the parties can elect to proceed in a United States District Court. If an election is not made, the matter proceeds to an administrative hearing. As with investigations, Congress has mandated that the hearings be completed within a specified period of time. Charges that proceed before OALJ are prosecuted by HUD's Office of General Counsel. If the administrative forum is used, a claimant could have a final administrative determination within 7 or 8 months from the date of the filing of the original complaint. If an election is made, the case is prosecuted by the Justice Department. Prevailing plaintiffs can secure a full range of relief including damages, attorneys fees and equitable relief. To advocates of Fair Housing, the enforcement mechanism created by the 1988 Amendments represents the fulfillment of the "empty promise" which was made in 1968.

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[178] This information was derived from HUD's computerized database. The information was supplied to the author by Lawrence Pearl, Director, Office of Programs Standards and Evaluation, by a letter dated June 18, 1991.

During the first 2 years of the implementation of the 1988 Amendments, FHEO has made significant strides towards establishing the enforcement mechanism the Amendments require. Comprehensive regulations were drafted and finalized during the first year of operation. Procedures for investigating complaints have been established. The adjudicatory process at OALJ is in place and is operating efficiently. The Fair Housing Enforcement section at the Justice Department is organized, fully staffed, and is handling a large caseload. FHEO has been expanded in Washington and additional staff has been added in each of the 10 regional offices. Training programs for investigators are ongoing.

During interviews with HUD Officials, it became evident that HUD's Fair Housing responsibilities are being taken seriously. It was also clear that HUD officials are proceeding with prudence and caution. The degree of caution is understandable since the agency's credibility with the courts, the public and with other agencies will aid considerably in the execution of HUD's enforcement duties. The enforcement program is still in its infancy and will need some additional time before it can be expected to operate at peak efficiency. There are, however, some patterns that have emerged.

A. The Impact Of The Addition Of New Categories

Complaints alleging discrimination of the basis of familial status constitute approximately one-half of FHEO's caseload. FHEO can expect complaints falling within this newly added status will continue to occupy a vast amount of its time and attention. Furthermore, because families with children are a newly protected group under the antidiscrimination laws, there is little to which HUD can look for guidance in developing interpretations concerning this aspect of the 1988 Amendments.

When an agency is confronted with a new problem, it has two choices. It can proceed on a case-by-case basis, relying on the courts and OALJ to establish precedents in the context of specific factual settings, or it can promulgate rules of general applicability.[179] The choice as to which of the two courses to choose remains with the agency as long as there is a reasoned basis for doing so. There are, however, some basic principles of antidiscrimination law which have been applied across the board regardless of the status of the protected group. Many of these theories have already been applied to housing discrimination cases. Thus, the disparate treatment theory, and the order and allocation of proof in such cases, (an approach established in McDonnell Douglas Corp. v. Green)[180] has been applied to housing discrimination. Therefore, a plaintiff must prove that he applied for housing, that his request was denied, and that the housing remained available or was given to someone who is not a member of the protected group. Once this showing is made the defendant must articulate a legitimate nondiscriminatory reason for its actions. Furthermore, the disparate impact theory of Griggs v. Duke Power Company[181] as modified by Ward's Cove Packing Company v. Antonio applies to housing discrimination.[182] (Wards Cove was superseded by the Civil Rights Act of 1991. Pub. L. No. 102-166 §§1745, 105 Stat. 1071 [1991].)

State courts construing state antidiscrimination legislation have consistently relied on Title VII precedent as guidance for interpreting state laws in areas in which there was no existing state precedent.[183] Although discrimination in housing occurs in a slightly different context, it seems likely that housing cases will follow the same approach. To facilitate the development of precedent in the newly-covered areas, the Assistant General Counsel may wish to consider a litigation strategy in which cases raising significant or novel issues are carefully screened to allow the resources of the office to be devoted to the cases that present the best fact patterns to obtain the desired results. The Solicitor General at the Department of Justice has long operated under a similar policy with respect to Supreme Court cases with a remarkable success record.

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[179] SEC. v. Chenery Corp., 332 U.S. 194 (1947). The Chenery II court held that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." (332 U.S. at 203).

[180] 411 U.S. 792 (1973).

[181] Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Court in Griggs held that discriminatory effect is adequate to establish a prima facie employment discrimination in claims under Title VII of the Civil Rights Act of 1964. The Act was held to proscribe "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." (401 U.S. at 431).

[182] 490 U.S. 642 (1989).

[183] See e.g., Konecy v. District of Columbia Department of Social Services, 447 A. 2d 31 (1982).

Unlike familial status claims, cases asserting claims of handicap discrimination should present fewer problems since a body of case law already exists which construes various aspects of Section 504 of the Rehabilitation Act.[184] With respect to these new categories of coverage, FHEO should recall the concerns of some of the legislators who feared a dilution of HUD's enforcement effort based on the numerous claims they anticipated under the handicap and familial status categories. Given the sheer volume of the family status and handicap cases, the race, sex, color and national origin cases could find themselves taking lower priority in the enforcement effort. Although the Congressional intention to include two new categories must be acknowledged, it should be remembered that segregation in housing was the target of the original legislation and it remains one of the most visible vestiges of formal segregation. FHEO should take care to assure that the goal of eliminating racially-segregated housing patterns remains among its highest priorities.

B. The High Percentage Of Judicial Elections

It was surprising to discover that in the majority of cases the parties elected to proceed in district court rather than before an ALJ. The statutory reasons for doing so are the availability of jury trials and the potential for a recovery of punitive damages. However, an award of punitive damages requires evidence of conduct that would be legally adequate to justify such an award and that is sufficient to persuade a jury that punitive damages are warranted. Since this is not likely to occur in most cases, the availability of punitive damages does not explain the high percentage of elections. From a tactical perspective, a defendant might wish to slow the progress of a cases result easily achieved by the selection of a district court forum because of the backlogs that exist in most federal districts.

There are, however, other concerns that ordinarily would weigh heavily against the desirability of a district court forum. First, housing cases are now in essence, the federal government versus the defendant. The government is represented by its elite litigating corps, the Department of Justice. The attorneys at the Justice Department are specialists recruited in a highly selective process. On the other hand, there is no Fair Housing bar comparable to the employment and labor bars. Thus, most experience and expertise in Fair Housing law would be found in the Justice Department and at HUD. Any strategic gain which might be derived from the district court forum would probably be offset by the time and expense of pretrial proceedings and the trial itself. Moreover, due to the time and expense of pretrial proceedings, the defense costs will be far greater when the district court forum is chosen.

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[184] Under section 504 of the Rehabilitation Act of 1973 an individual is considered handicapped if he or she "has a physical or mental impairment which substantially limits one or more major life activities, [if he or she] has a record of such impairment, or is regarded as having such impairment." 29 U.S.C. §706(7)(B). See also 34 CFR §104.3(J)(2)(ii) (1986). Coverage under this statute has been construed, broadly see e.g., Vickers v. Veterans Administration, 549 F. Supp. 85 (W.D. Wash. 1982) (where hypersensitivity to smoke was deemed a handicap).

These considerations suggest that the more desirable forum for both parties would be the administrative proceeding before an ALJ. Under the 1988 Amendments, this proceeding must be completed within a relatively short period of time after the charge is filed, with a review available directly in the Court of Appeals. Hearings are by statute, regulation and practice, expeditious and inexpensive. The litigants also have the advantage of a decisionmaker who is well-versed with the subject matter of the litigation. There is, of course, a jury trial available in district court, but Fair Housing cases are not the sort of proceedings in which there would be any significant advantage gained by having a jury find the facts except in cases where the defendant's discriminatory conduct might prompt the jury to award damages in an amount higher than usual. The high percentage of elections is not a result Congress anticipated and it seems to operate against the interests of the parties.

After a draft of this report was circulated, HUD responded with a letter to the Administrative Conference. In this response, HUD indicated that it had conducted a study entitled "A Study of the Election Decision" to determine why so many parties have elected to proceed in the judicial rather than the administrative forum. The letter concluded that the "findings indicate that HUD could probably do a better job of informing the parties about the election process."[185] HUD also stated it was developing a brochure to be distributed to complainants which would attempt to explain, in layman's language, the availability of the forums and to provide information which would allow the parties to make a more informed choice concerning forum elections.[186] Informal discussions suggest two reasons for the high number of elections in which the parties choose to proceed in District Court: (1) A general lack of knowledge concerning the new procedures that are available under the 1988 Amendments and (2) a lack of confidence in HUD's ability resolve claims in expiditious manner. In the case of respondents, there is also a perception that since claims are prosecuted by HUD, an administrative proceeding at HUD will not provide the sort of impartial and unbaised adjudication the administrative procedure is intended to provide.

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[185] Letter from Gordon Mansfield dated February 7, 1992, to Nancy G. Miller. (Copy on file with the author).

[186] Id.

C. Delays In Investigating Complaints

As HUD officials are aware, there is one area in which the agency has failed to implement the enforcement mechanism in accordance with its statutory mandate. In the vast majority of cases, complaints are not processed within the 100-day time period which is allocated by the statute. Subsequent to the enactment of the 1988 Amendments, the volume of complaints filed with HUD has almost tripled. Most of the increase is attributable to the newly protected categories--handicap and familial status discrimination. Furthermore, the burden imposed by the increase is heavier than it might otherwise have been since none of the state and local agencies are processing complaints falling within newly-added categories.

During 2-year period following the enactment of the Amendments, there has been no rush by state and local governments to amend their antidiscrimination statutes to conform to the changes in the federal statute. Furthermore, in a time of recession and reduced tax revenues, states and localities might be willing to add familial status and handicap to their local antidiscrimination laws but they may not be able to assume the costs of creating adjudicatory mechanisms which would function like OALJ and to hire attorneys to prosecute claims.

It is quite possible that FHEO will continue to bear a disproportionate case-load as a result of the inability of states and local agencies to achieve substantial equivalency after the grandfathering provisions of the 1988 Amendments expire. In December 1991, a meeting was held in Raleigh, North Carolina with HUD and the various state and local Fair Housing Agencies. During this meeting it became apparent that the vast majority of the state and local Fair Housing agencies that were grandfathered as existing equivalent agencies on the effective date of the 1988 Amendments would not be able to satisfy the equivalency requirements of the 1988 Amendments and the implementing regulations by January 13, 1992, the date by which these agencies were permitted to secure equivalency under the 1988 Amendments.[187] At the time the meeting was held, only a small number--less than 10 agencies had been certified as equivalent under the 1988 Amendments.

During the course of the meeting, which was attended by HUD officials, representatives of the state and local Fair Housing Agencies and representatives Fair Housing Advocacy groups, a tentative arrangement was proposed. Under the proposal, which formed the basis of an agreement by the various groups, State and local agencies that had shown substantial progress towards achieving equivalency would be eligible to receive an 8-month extension under the provisions of section 810(f) of the 1988 Amendments

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[187] The Regulations are contained in 24 CFR Part 115.

(which allows for extensions of interim equivalency certifications in exceptional circumstances). It was also agreed that during this period, investigations would be conducted by the state and local agencies. However, in the case of complaints in which cause determinations are made, the parties will be allowed to elect to proceed under the federal adjudicatory process. This means that parties in state or local proceedings may use the administrative adjudicatory mechanism that is available at HUD or they could opt to have their claims adjudicated in a federal district court. Pursuant to this proposal, 113 state and local agencies requested an extension of the interim equivalency certifications. HUD approved 110 of these requests. The 110 state and local agencies that were approved now have until September 13, 1992, to achieve statutory equivalency.[188] To reduce the existing backlog of complaints, FHEO may wish to reassess its own complaint processing procedures. At present, all complaints are reviewed at the regional office level and by FHEO Headquarters in Washington. In January 1990, the Office of General Counsel delegated the authority to make cause determinations to the various regions but no corresponding delegation was made by FHEO. The decision to centralize the review process was probably prudent during the initial months of the implementation process but it adds a substantial period of time to complaint processing.

Comprehensive regulations have been promulgated. If the investigators at the regions perform their duties with adequate guidance from the regional attorneys, a time-consuming level of review could be eliminated. The investigations could be carried out at the regional level with headquarters retaining oversight responsibility. FHEO has developed an investigation manual and it is conducting training sessions at the various regional offices. At some point, the regional offices should develop sufficient expertise to make cause recommendations with little more than a pro-forma review by FHEO headquarters.

Congress enacted the 100-day requirement for a reason. Several agencies have been unsuccessful defendants in mandamus actions that required them to promulgate regulations, process claims, or to carry out enforcement obligations established by Congress. Congress was aware of these cases when it specified deadlines in the statute rather than leaving the agency to set its own deadlines with regulations. The Secretary does not have any discretion in this regard. There is nothing more frustrating to a complainant than to file a complaint and not hear anything further for several months.

Furthermore, prompt judicial action should be taken in more cases. Housing discrimination is, by definition, extremely time sensitive. The complainant in a Title VIII action is an individual or a family in search of housing--an essential need which must be met. Apartments do not remain vacant indefinitely and houses do not remain unsold. If alternative housing is secured during the pendency of the complaint, the incentive to pursue the claim is diminished considerably, if not lost altogether.

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[188] Interview by author of Deputy Assistant Secretary Leonora L. Guarraia April 7, 1992, and Lawrence Pearl, HUD Office of Program Standards and Evaluation, April 6, 1992.

Because of these circumstances, the procedure for determining whether prompt judicial action is appropriate should be improved. This, of course, would require the involvement of attorneys who could analyze the need for and likelihood of securing interim equitable relief. This determination would need to take place at the regional level with some means of communicating the recommendation in an expeditious manner to the Justice Department in Washington. FHEO's caution and desire to maintain a high level of quality is admirable but its failure to satisfy its statutory obligation is one of its most significant shortcomings and must be rectified.

VI. Recommendations

The enforcement initiatives brought about by the 1988 Amendments to the Fair Housing Act are still in their earliest stages of development. However, a few trends have become sufficiently salient to provide the basis for recommendations. HUD officials have exhibited a serious conviction towards bringing about, for the first time, a functioning Fair Housing enforcement mechanism; there is reason to believe that these concerns, as well as others, will be addressed in the near future.

A. Racial Segregation As A Unique Problem Requiring Special Attention

Congress' decision to bring two new categories within the protection afforded by the Fair Housing Act is unquestionably a laudable one. However, racially-segregated housing and the myriad of secondary effects caused thereby are at least as much of a problem today as it was in 1968. These secondary effects (discussed in the introduction to these materials) are distinct from any that might be attributed to the denial of housing to handicapped persons and families with children. It is crucial, therefore, that these new categories and the resultant increased complaint caseload should not be allowed to obscure the original mission of the Fair Housing Act: the elimination of racially discriminatory housing practices. To that end, HUD must acknowledge the differences between each protected category and strive to tailor its procedures accordingly.

B. The Need For Increased Utilization Of OALJ Proceedings

Much of the hope for increased enforcement of the Fair Housing Act offered by the 1988 Amendments was found in the provisions expanding the use of administrative adjudications of complaints. The OALJ forum would appear to be the better route, due not only to the added expertise but also to the increased efficiency and reduced costs. To a large degree, the success of the enforcement provisions of the 1988 Amendments is dependant upon the increased utilization of this forum. Accordingly, it is incumbent upon HUD to devise and implement procedures to enlarge the role of OALJ.

C. The Need For Rapid Complaint Resolution

Shelter is a basic human need such that it should be recognized that alternative housing must and will be obtained during the pendency of complaint enforcement. This reality requires that the enforcement mechanism not only be fair, but fast if the complaint is to be resolved in a way that results in the aggrieved individual actually acquiring the premises which were denied before settling into another abode. If HUD is to genuinely pursue rapid complaint resolution it must first acknowledge the increasing threat that state and local agency referrals pose to that goal. The widespread depletion of state and local fiscs has direct bearing on these agencies ability to react quickly to complaints that are referred from HUD. It is up to HUD to evaluate each state and local agency to determine its ability to quickly resolve complaints. This ongoing evaluation should provide the basis for not only which agencies are utilized, but for the optimum number and type of complaints that can be processed by that agency. By directing cases accordingly, HUD can ensure that state and local referrals do not become the equivalent of 'shelving' complaints.

Conclusion

The elimination of segregated housing patterns would ameliorate many of the vexing problems of race relations which confront the nation in the final decade of the 20th century. The continuing segregation in public schools is attributable in a large measure to concentration of black families in inner-city areas and the prevalence of white families in suburban areas. On March 31, 1992, the Supreme Court held in Freeman v. Pitts.,[189] that federal courts could relinquish supervision and control of school districts in incremental stages, prior to the time that full compliance with an earlier desegregation decree is achieved. Perhaps, most significantly, the Court found that where resegregation of public school is a product of private choices as opposed to state action, a school board does not have a duty to remedy any resulting racial imbalances that are caused by demographic factors such as racially segregated housing patterns. This decision indicates racial segregation in housing has a direct effect on continuing problems and issues in school desegregation. If racial segregation in housing is eliminated, the continuing dilemma of segregated schools could be resolved without the use of controversial measures like busing to achieve racial balance. Another consequence of segregated housing is a lack of access to employment opportunities. Since the conclusion of World War II, the employment opportunities which originally lured black workers to urban centers have moved to suburban areas to which the residents of inner cities have limited access. This access problem is one of the factors which contributes to disproportionately high unemployment rates in urban areas.

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[189] 60 U.S.L.W. 4286 (March 31, 1992).

These key elements; the denial of equal educational and equal employment opportunities are at the core of problems which plague the black community. Although the elimination of segregated housing patterns would not eliminate these problems in their entirety, it would assist considerably in their mitigation. In short, the need to eliminate racially-segregated housing patterns cannot be over emphasized. It is essential to removing the lingering vestiges of formal segregation. If housing patterns were the result of choice without respect to race, a different and better future will result.

Congress recognized this when it enacted the original Fair Housing Act in 1968 but it was unable at that time to include an adequate enforcement mechanism. The 1988 Amendments have added the ingredient which was missing from the original legislation. The Department of Housing and Urban Development now has the means to enforce violations of the Fair Housing Act. When housing providers become aware of the severe economic consequences of their unlawful conduct, they will have a considerable incentive to eliminate discriminatory practices. Effective enforcement is essential to obtain the result which Congress intended. Congress has created an adequate enforcement mechanism, whether HUD will implement its responsibility consistent with its Congressional mandate remains to be seen.

Report for Recommendation 92-4

Coordination of Migrant and Seasonal Farmworker Service Programs

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

Preface

This report results, ultimately, from the longstanding desire of those who assist migrant farmworkers to improve the services they can provide. It derives more specifically from the statutory mandate of the National Commission on Migrant Education (NCME). The statute that chartered the Commission in 1988[1] directed it to examine a long series of questions, relating primarily to the present functioning and the future needs of the Migrant Education program administered by the Department of Education. But the statute also asked the Commission to cast a wider glance, and to consider how the Migrant Education program might be better integrated and coordinated with other migrant assistance programs.[2]

To carry out this task, in March 1991 the Commission contracted with the Administrative Conference of the United States (ACUS) to study the coordination of federal programs that serve migrants, including close consideration of the differing definitions of "migrant" that these programs employ. The Commission was aware of ACUS' reputation as a government think tank that has amassed an estimable record of studies and recommendations on improving federal government procedures and structures. During the course of its 25-year history, ACUS has often considered interagency coordination questions. Knowing that coordination proposals can often tread on the sensitivities of the affected agencies, the Commission has indicated that it turned to ACUS to help assure a high degree of impartiality in the recommendations that would ultimately result.

As the consultants invited to undertake this study, we have done our best to live up to these expectations and the high standards of the two bodies. We present the study in the hope that it, and any ACUS and NCME recommendations or conclusions to which it might contribute, will help improve the delivery of services to migrant and seasonal farmworkers.

One further note: veterans in the farmworker service program world use a host of acronyms that have become like a second language. For those who have not yet been initiated into the secrets of this tongue, we provide a glossary of acronyms in Appendix A.

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[1] Pub. L. No. 100-297, §1001, 102 Stat. 193 (1988), codified at 20 U.S.C. §2839 (1988).

[2] 20 U.S.C. §2839(c)(4) specifically directs the Commission to examine interagency coordination, but the Commission also found that coordination issues relate in some way to nearly all of the questions it was asked to consider.

Executive Summary

Migrant farmworkers are among the poorest of America's residents, and since the 1960s, the federal government has launched several service programs to help meet their needs. Migrants have been considered a uniquely federal responsibility, both because of their interstate movement (which makes it hard for the workers and their families to qualify for local assistance and disrupts other services such as schooling for their children), and because of their relative powerlessness in state and local politics. As these programs have evolved, many have come to serve nonmigrant seasonal farmworkers as well.

The programs to meet the health, education, housing, job training and other needs of migrant and seasonal farmworkers (MSFWs) have developed separately. There are approximately ten MSFW-specific service programs, and farmworkers also draw upon the assistance of other general programs such as food stamps or legal services. Each program has its own definition of migrant and/or seasonal farmworker, as well as other eligibility standards. The result is a potential for overlap of some services and gaps in others, and Congress has made inadequate provision for coordination among programs. At the request of the National Commission on Migrant Education, this study examines regulatory and definitional barriers that impede coordination among MSFW service programs, with special attention to the "Big Four" programs (ME, MH, MHS, and JTPA 402), which expend about $500 million annually to assist MSFWs.

The Major Programs

Migrant Education (ME)

Since 1966, Congress has provided special supplementary funding to state educational agencies (SEAs) based on their respective populations of school-age children in migrant farmworker families. Early estimates of the number of ME children in each state relied on Labor Department data but ME counts are now based on the more detailed records of the Migrant Student Record Transfer System (MSRTS). Congress appropriated $286 million for Migrant Education in FY 1991, yielding an average grant of about $500 per identified migrant child. SEAs have considerable flexibility in choosing how to use these supplements to enhance education for migrants.

Under the definition of migrant farmworker in the ME regulations, agriculture includes production and processing of crops, livestock, dairy products, and fisheries. Children are "currently migratory" if the family member made a qualifying move across school district lines in search of agricultural employment within the past 12 months. Thereafter, they may still receive ME services for up to 5 years as "formerly migratory," with the parents' consent. Currently migratory children are supposed to receive priority in ME programs, but the distinction often makes little difference in practice. ME has been criticized because each state's funding is based on the number of children recruited into the program, not the number of migrant students actually served. This situation was perhaps aggravated by a statutory change in 1988, which expanded the age range of eligible children to ages 3-21, from the former range of 5-17. Several persons interviewed also questioned the lengthy "look-back" period ME employs, the longest of any MSFW service program, resulting in eligibility for up to 6 years after a qualifying move.

Migrant Health (MH)

Migrant Health is the oldest of the special federal programs for migrants, dating to 1962. It funds some 400 clinic sites in "high-impact areas" for migrant activity, operated by 102 grantees (mostly private nonprofit organizations) in 43 states. The FY 1991 appropriation was $51.7 million. These clinics were originally authorized to serve only migrants and their dependents, but in 1970 Congress authorized services also for seasonal farmworker families, when the Secretary finds that the provision of such services would contribute to improving the health of migrants. Agriculture (defined to include crops but not livestock) must be the "principal" employment of MH beneficiaries. To qualify as a migrant, a worker must have established a temporary abode for such work within the past 24 months.

Migrant Head Start (MHS)

Head Start, a comprehensive preschool child development program operated by the Department of Health and Human Services (HHS), is perhaps the most effective of the programs launched by the War on Poverty. Migrant Head Start adapts the basic program to the special needs of migrant children, serving them from birth through age 5. The 1990 appropriation of $60.4 million funded services to 23,649 children in 33 states, through the efforts of 23 MHS grantees, mostly private nonprofit organizations. No definitions of the key terms appear in statute or current regulations, but in practice MHS serves the children only of those primarily employed in farmwork (crop and tree agriculture, not livestock). The family must have migrated within the last 12 months to be eligible and ordinarily must have an income below the federal poverty line.

Job Training (JTPA 402)

The Department of Labor funds special job training programs for MSFWs and their dependents, through a nationally administered program established under Section 402 of the Job Training Partnership Act (JTPA). The FY 1991 appropriation was $70.3 million. Funds are first allocated among the states based on decennial census figures (adjusted), and then renewable 2-year grants are awarded to organizations that will provide the services in the state. The grantees in 1991 were 29 private nonprofit organizations and five public bodies. The most expensive training component of the program usually assists farmworkers in gaining the skills necessary to move into more stable, nonagricultural employment. But grantees may also spend up to 15 percent of their funds on "nontraining-related support services," a highly flexible category that can include transportation, health care, shelter, meals, and other services for MSFWs in the state.

The regulations provide for a 24-month look-back period, but an applicant must qualify as a seasonal farmworker by meeting more detailed specifications (primary employment in agriculture, with a minimum of 25 days worked or $400 earned) for any consecutive 12-month period within the past 24. Migrants are those seasonals who were unable to return to their domicile within the same day as a result of their employment. Agriculture includes crop and livestock work. JTPA beneficiaries must also meet an income test and must be authorized to work in this country.

Coordination at the State and Local Level

State level coordination among programs is often overseen or administered by a governor's board or task force, which may bring together growers' representatives, advocacy organizations, and officials of migrant service programs and other state agencies. Some local areas have created equivalent bodies. Often the coordination function consists merely of information sharing and referral of clients. Coordination becomes much more sensitive and difficult to accomplish if proposed actions carry resource implications or involve the transfer of funding. Nevertheless, some local or state bodies have accomplished more than just the sharing of information; effective coordination often depends on the initiative and perseverance of the participants. For example, some states have moved toward a consolidated outreach process, so that migrants need fill out only one form upon arrival in the area to register for services, rather than being contacted by as many as seven different outreach workers who collect the full range of biographical and background information.

Although many service providers will answer an abstract question about barriers to coordination by referring to definitional differences, we did not find as many concrete examples of coordination problems stemming from this source as we had expected. In any event, even a uniform federal definition of MSFW would not ensure coordination, because migrant services at the local level draw also on a host of other public and private assistance programs, each with their own requirements.

Although definitions did not appear to be a major obstacle to local or state coordination, we recommend that steps be taken to move toward a common definition, for two main reasons. First, progress toward a common definition could be expected to facilitate consolidated outreach; duplicative outreach and intake processing constitutes one major area for potential administrative savings and better overall coordination. Second, agreement on at least a core definition of migrant and seasonal farmworkers would foster the development of a unified mechanism to provide a reliable count of the MSFW population in this country. This is something strongly desired by many service providers. If sufficiently current and detailed, such a census or estimation system could also facilitate better targeting of MSFW assistance programs. Over time, experience with a unified core definition used for purposes such as enumerating MSFWs might also make it easier for more programs to accept a harmonized definition for purposes of eligibility.

Data and Definitions: Toward a Uniform Core Definition

It has never been easy to agree on the number, characteristics, and distribution of MSFWs, in part because of substantial difficulties in reaching agreement on the key concepts. There are numerous data sources that have been adjusted, in both top-down and bottom-up fashion, to estimate the number of such workers, but all are beset with difficulties. Some programs rely on flawed estimates of their target populations to distribute funding.

To define the target population and determine eligibility for services, at least six steps must be followed. (See Table 3, pp. 49-50.) First, it is necessary to define "agriculture." All definitions include crops; should livestock and fishery operations be covered as well? Should packing and processing? Second, "farmworker": Should the definition cover only those primarily employed in agriculture, and should there be minimum and maximum employment required? Third, "migrant": How should the required move be specified? Should there be a requirement that the movement cross a specific border (e.g., school district or county line)? Fourth, the look-back period: This ranges from 12 months to 6 years in current MFSW service programs. The fifth step involves more detailed criteria for eligibility, such as the age ranges to be covered. And sixth, the program must decide exactly where and in what manner to provide services to those eligible.

Our proposed core definition would cover the first four of these steps. We recommend that agriculture be defined as in the Fair Labor Standards Act, i.e., to include crop and livestock agriculture, as well as that part of processing performed by a farmer on a farm. "Farmworker" should include only persons primarily employed in agriculture, and seasonal farmworkers should be those with a minimum of 25 days worked in a year, but not having constant year-round employment. Migrants should have to cross a county boundary (this element ties in with other available data sources) and stay away from home overnight. Finally, the look-back period should be 24 months, so as to focus on those most in need of assistance owing to the disruptions that accompany a move, but allowing for continued services during the first year after the family settles out of the migrant stream.

Coordination at the National Level

Because of the diversity of services (both migrant-specific and general) that must be considered and incorporated, the focus of improvements in coordination must be at the local and state level. Nevertheless, the process could be facilitated by improved coordination at the national level. This section surveys existing coordination entities and sketches options for improved mechanisms.

Current Bodies

In addition to limited ad hoc coordination agreements, sometimes embodied in Memoranda of Understanding, there have been three principal forums for interagency coordination.

Since 1985, the federal MSFW assistance agencies have been meeting quarterly in Washington under the auspices of the Interagency Committee on Migrants. The various agencies involved rotate responsibility for hosting the meetings and setting the agenda. This forum serves mainly as a vehicle for information-sharing among the officials and nonprofits that attend; most participants agree that it has been a useful forum for this modest but important task.

In 1990 a second body began meeting on an ad hoc basis in an effort to create a forum for policy makers to gather and deal with coordination issues that require policy resolution--tasks not readily accomplished by the Interagency Committee. The Departments of Labor, HHS, Education and Agriculture have been involved in this Farmworker Interagency Coordinating

Council, which was intended to include a smaller number of policy level participants. Some of the key personnel have recently changed jobs, however, and the Council is now inactive.

The grantee service providers have also recently improved their own cooperation, notably by providing for a joint national meeting of the service providers from the Big Four programs in Buffalo in April 1991. This process of building better links among program officials will be continued, under the auspices of a Migrant Inter-Association Coordinating Committee, looking toward another joint meeting in 1993. The Committee is also charged with planning other tasks for the Inter-Association Coalition, including workshops, publications, and possible work on legislative issues.

Evaluation

Most persons interviewed agreed that coordination at the national level is improving, but they also frequently voiced dissatisfaction with current arrangements. Existing bodies do provide for a fair amount of information-sharing, but other objectives are not as well served. For example, coordination should provide a mechanism to improve the geographic targeting of services, so that assistance can keep up with changes in agriculture.

There should also be a method to deal with duplication and overlap, although many persons interviewed pointed out that the problem of overlap is more theoretical than real, given that each agency serves only a fraction of its target population. Nevertheless, the internal dynamics of each agency seem to push toward expansion of jurisdiction, including expansion of the age ranges served, without attending to the possible effects on other agencies, and without asking whether the same service objectives could be better served through one of the other organizations.

An improved coordination body should be able to review such expansions, as a policy matter and on an interagency basis, before they go into effect. It should also find ways to reduce the burden of duplicative outreach and intake procedures. Ideally it would also have the capacity to review overall budget strategies and to consider ideas that might transcend any one agency's jurisdiction for improving comprehensive services to migrant families. There is currently no single officer, even at the Office of Management and Budget (OMB), who looks comprehensively at all migrant service budgets.

Existing coordination bodies depend on ongoing comity and support from each constituent agency or organization; because they are not founded in statute, regulation, or executive order, they lack any legal requirement that agencies continue to participate. As a result, they usually shy away from tough questions about the allocation of responsibilities or from suggestions that would shift functions and perhaps budget between agencies. Improving coordination requires developing this capacity, in order to probe whether service objectives, which transcend agency boundaries, are being effectively served. A new mechanism should also have the ability to engage the attention of the key policy-making officials in affected agencies, including Department heads.

Possible Alternatives

Information Clearinghouse

There has been considerable interest in a National Center for Migrant Affairs, usually conceived as an improved information clearinghouse. We do not regard such a center as a high priority. Existing programs have their own clearinghouses or other forms of resource centers, sometimes with quite extensive and elaborate services. But field-level service providers are usually not well-equipped, owing to limited funding, to draw on these resources. A National Center, if created, should serve only as a kind of umbrella for the existing resource centers and clearinghouses.

Department or Agency of Migrant Affairs

Truly comprehensive services might be better designed and managed if all MSFW assistance programs were combined in a single federal department or agency. But any improved coordination among MSFW programs that might result would probably be outweighed by losses in effective coordination with other related governmental services, such as other Public Health programs. Moreover, current agency locations provide a kind of mainstreaming for a population that can easily be separated and stereotyped. There is no significant support for a total unification option.

Improved Interagency Council

Interagency cooperation might be strengthened, without major restructuring, by placing the existing interagency council on a firmer footing, through statute or executive order. If this option is chosen, the chartering instrument should designate the membership, consisting of a limited number of persons with policy-making authority, at the rank of Deputy Assistant Secretary or above. It should also provide for chair responsibilities to rotate, on a minimum 2-year cycle, to maximize continuity and to allow the chairing agency to draw on its own resources for staffing. And it should require council review of any changes in jurisdiction, mandate, or regulations of any of the participating agencies. OMB should also designate a single staff specialist to provide an overview of MSFW assistance functions. Finally, the new council might best get a running start on its functions if the chartering instrument expressly assigned specific tasks, such as developing a core MSFW definition, a better census mechanism, or a more unified outreach and intake procedure.

There are certain disadvantages with this model. Despite its firmer foundation, the council would still be dependent on the goodwill of the agencies for its effectiveness. It would lack staff of its own, and it might not have sufficient clout to assure attention by department heads or other key policy level officials.

Coordinator for MSFW Programs

The fourth model contemplates a new position of coordinator for MSFW service programs, preferably created by statute. The coordinator would be appointed by the President with advice and consent of the Senate. To avoid the Coordinator's identification with any one agency, the office should be located in the White House. We heard substantial objection to creating such a post, and the concerns have some merit. The office might only generate additional paperwork and red tape, draining resources from the actual services. And some fear that a White House location might lead to undue politicization. Others proposed ways in which such risks might be minimized--by keeping the office small, with a staff of perhaps a half dozen professionals, and by requiring that the coordinator be appointed from among persons with at least 2 years' field experience in migrant service programs. Also, the office should have jurisdiction only over service programs, not over enforcement regimes affecting farmworkers, for the latter can be politically controversial and might make politicization more likely.

Recommendation

Although we consider the question a close one, we favor an improved interagency council. It should be established by an executive order that would determine its membership and also assign it certain initial high-priority coordination tasks.

I. Introduction

A. The Migrant Population

Migrant farmworkers are people who cross geographic boundaries and stay away from home in order to do farmwork for wages. A diverse collection of individuals satisfies these criteria. Most are solo men who travel in groups or crews of 20 to 40 without their families, but many are families whose children accompany them from farm to farm. Some migrants move long distances, such as from south Texas to Michigan or south Mexico to Oregon, and stay away from their usual residences for 4 to 6 months, while other migrants move less than 100 miles from home and stay away only a few days. Some are teenagers who spend part of their summers working on a relative's farm.

Migrant farmworkers have traditionally been among the poorest workers in America. The tale of impecunious but hardworking families packing up their belongings and following the ripening crops has been retold in moving novels, including John Steinbeck's *The Grapes of Wrath* in 1939, television documentaries such as Edward R. Murrow's *Harvest of Shame* in 1960, and congressional testimony such as that heard by Senator Walter Mondale's Senate Subcommittee on Migratory Labor in 1971.[3] Most materials on migrant farmworkers reinforce the stereotype that migrants are minority families who are strangers-in-the-fields at their temporary workplaces and who have special needs and problems that are not addressed by their employers or by local assistance programs in the communities in which they temporarily reside. Although this stereotype masks some of the diversity in today's farm labor force,[4] it has been the source of sympathy and federal initiative to address the migrant's needs. In many cases, that initiative has eventually led legislators or administrators to expand their programs so that they may also meet the needs of nonmigrant seasonal farmworkers.[5] By 1990, federal expenditures for service programs intended specifically for migrant and seasonal farmworkers (MSFWs) totaled over $500 million annually, or equivalent to about 10 percent of total migrant farmworker earnings by some estimates.[6]

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[3] Farmworkers in Rural America, 1971-72: Hearings Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st & 2d Sess. (1971-72).

[4] See P. Martin, Harvest of Confusion 11 (1988).

[5] Generally speaking, seasonal farmworkers are hired farmworkers employed in agriculture on less than a year-round basis. Migrants are usually considered a subset of seasonal farmworkers. (The numerous detailed disputes over more precise definitions will receive close attention in Part IV, infra.) Some federal service programs focus principally on migrants; they are usually premised on the need for services to overcome the disruptions that derive from frequent changes of residence. But seasonal farmworkers are also largely poor, and their intermittent employment also causes other sorts of disruptions and resultant disadvantages. See generally Department of

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Labor, Findings from the National Agricultural Workers Survey (NAWS) 1990, at 54 (1991) [hereafter cited as NAWS Findings] (one-half of seasonal agricultural workers--a category which includes migrants--have incomes below the poverty level).

[6] According to the NAWS Findings, supra note 3, the median annual income for surveyed Seasonal Agricultural Services or cropworkers was between $5,000 and $7,500 in 1990. There are between 2 and 2.5 million farmworkers employed sometime during the year in U.S. agriculture, but not all of them are migrants. The NAWS defined migrants as workers who travel 75 miles or more to do farmwork, and because 40 percent of the NAWs sample workers spend part of each year abroad (usually in Mexico), id. at 83, at least 40 percent of the NAWs workers are migrants who shuttle back and forth. About 15 percent of the NAWs sample follow the crops in the United States, and some shuttle migrants also follow the crops, so that 42 percent of the NAWs sample are migrants, or 940,000 of 2,250,000 farmworkers. If 940,000 workers average $6,000 each, they earn a total $5.6 billion, roughly 10 times the amount now spent on federal MSFW service programs. (See Table 1.)

Another 40 percent of NAWs sample workers are employed less than year-round in U.S. agriculture. However, not all of these workers would be considered "seasonal" under all definitions: some do only a few days of farmwork, and others work 9 or 10 months but not year-round.

Table 1

Federal Migrant and Seasonal Farmworker Programs

Program	Dept.	Services	Funds ($Mil In FY92	Funds ($Mil In FY88	Percent Change
Migrant Ed. (ME)	DEd	Funds state educational agencies (SEAs) to serve the children of migrants who are 3 to 21	$308.3	$269.0	14.6
Migrant Health (MH)	HHS	Funds clinics that provide primary health care for MSFWs and their dependents	77.6	65.6	18.3
Migrant Head Start (MHS)	HHS	Early childhood program for migrant children age 0 to 5	85.9	$418.6	26.5
Total "Bib Four" Programs			$529.5	$418.6	26.5
High-School Equivalency	DEd	Funds colleges and universities to assist migrants and their dependents to get a high school diploma or equivalent	8.3	7.3	13.7
College Assistance Migrant Program	DEd	Funds colleges and universities to assist migrants and their dependents to get a high school diploma or equivalent	2.3	1.3	76.9
Migrant Even Start	DEd	Funds Programs to coordinate child and adult education for migrants	2.1		
Migrant vocational rehabilitation	DEd	Funds Programs for handicapped migrants	1.0	1.1	-9.1
Women, Infants, and Children (WIC)	USDA	Provides food and nutrition counseling	17.5	13.0	34.6
Migrant legal services	LSC	Provides legal services to migrants	10.8	9.4	14.9
Section 516 MSFW housing grants	USDA	Grants to nonprofit organizations for farmworker housing	11.0	11.2	-1.8
Section 514 MSFW housing loans	USDA	Loans to farmers and nonprofits for farmworker housing	16.3	11.4	42.9
Community Services Block Grants	HHS	Block grant funds reserved for farmworkers	3.0	3.0	0.0

MSFWs also participate in other programs for which they qualify, including Food Stamps, AFDC, literacy programs, homeless programs, bilingual immigrant education, and low income home energy assistance.

Source: AFOP Washington Newsline, November/December 1991, at p.3 and June 1988, at p.3, supplemented by interviews of selected agency officials

B. Federal Programs

During the 1960s the federal government launched a War on Poverty, enacting or expanding numerous statutory programs for assisting poor and disadvantaged Americans. Some of these programs technically included farmworkers within their compass, but it was often argued that migrant farmworkers would be excluded or underserved by these State-administered programs. As a result, the government also established during the 1960s numerous programs specifically dedicated to serving migrant farm workers and their families.

Specially targeted federal efforts for migrants were justified on several grounds. Most importantly, migrants have special needs that result simply from the fact of their mobility. Often they are not in one location long enough to do the paperwork or clear a waiting period for benefits administered by state and local governments. For migrant children in particular, frequent moves cause obvious disruptions in schooling.[7] The resulting educational deficiencies might trap them in a culture of migrancy and poverty. In the 1960s, this prospect was viewed as especially disadvantageous, because migrancy was expected to disappear as mechanization displaced migrants. Migrant children would be unable to follow their parents into farmwork, but they would also be unprepared to compete in the nonfarm labor market.[8] The withering away of migrancy of course has not come to pass, but other changes have strengthened the case for special assistance programs--including the problem of language barriers as the migrant workforce has come to be dominated increasingly by citizens and recent immigrants of Latino origin.

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[7] See, e.g., House Comm. on Education and Labor, Elementary and Secondary Education Amendments of 1966, H.R. Rep. No. 89-1814, 89th Cong., 2d Sess., at 10 (1966).

[8] Predictions about the demise of migrancy proved inaccurate. Per capita consumption of fruits and vegetables increased, and Americans shifted from easier-to-mechanize canned and processed products to hand-harvested fresh commodities. Between 1970 and 1989, per capita consumption of vegetables rose 13 percent from 177 to 200 pounds per person per year, and fruit consumption rose 17 percent. from 97 to 114 pounds per person per year. Fresh fruit and vegetable consumption rose enough to offset declines in canned consumption. For example, fresh vegetable consumption rose 42 percent to 102 pounds while canned vegetable consumption fell 10 percent to 83 pounds per person. US Department of Agriculture, Economic Research Service, Vegetables and Specialties: Situation and Outlook 8 (TVS 252, 1990). The number of MSFWs stabilized and even increased in some areas as labor-intensive agriculture expanded faster than mechanization displaced workers on the fewer and larger farms that accounted for most U.S. fruit and vegetable production.

Furthermore, migrants were often thought to be the unique responsibility of the federal government. Migrants usually do not vote in the jurisdictions in which they work (if in fact they have voting rights at all; as foreign nationals, many cannot vote in the United States). In addition, their relations with the local population may be strained. Migrants are often regarded by farming communities as a necessary evil needed to get the crops picked, but necessary for only part of the year.[9] Too many benefits might encourage them to stay, diverting resources to migrants that, some local leaders concluded, should be reserved for residents who were disadvantaged. Even without such local suspicion or hostility, there may be little contact between migrants and permanent residents that would lead to initiatives to help meet the migrants' needs. Local efforts therefore could not be relied upon for assistance, and even the general assistance programs funded by the federal government, usually administered by state or local officials through cooperative arrangements, might not take adequate account of the particular needs of migrants.

Special programs for migrants often mean that they receive benefits under specialized programs that do not serve the nonmigrant poor--or that special funding is available to agencies serving migrants that they would not receive if they served other segments of America's disadvantaged population. There is nothing improper or surprising in this fact; it is an inevitable corollary of the nation's recognition of special migrant needs that require unique programs. But this difference does create certain difficulties unperceived in the heady days of the early War on Poverty, when the nation appeared to have the capacity to address the problems of all of the disadvantaged. As budgets tightened and benefits declined in the 1980s, special and comparatively better services for migrants posed more acutely these questions: Who qualifies for such services? What priorities should be established to parcel out limited migrant assistance budgets? And how can the programs be managed or designed to minimize any possible incentive to manipulate migrant status in order to claim such benefits or expand bureaucratic turf?

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[9] See, e.g., N. Klores, Farmworker Programs under the Comprehensive Employment and Training Act--A Legislative History 24 (1981) (describing the reasons that led the directors of some of the earliest federal migrant assistance programs, under Title IIIB of the Economic Opportunity Act of 1964, to assure that migrant programs would be under centralized national management in the headquarters of the Office of Economic Opportunity (OEO)).

For most programs today, these questions are answered by the definitional provisions of the specific migrant assistance scheme--often coupled with a first-come first-served rationing of benefits that may run out well before the end of the list of eligibles. But the definitions were enacted piecemeal and reflect no overarching congressional or administrative theory about those most likely to benefit from, or most deserving of, the particular assistance at issue.

Each federal MSFW assistance program has a unique definition of the migrant and seasonal workers who are eligible for services. These definitions differ, for example, in the border that must be crossed to be considered a migrant, in the type and amount of qualifying work done, and in how long a migrant can continue to receive services after he or she has stopped migrating. These differences in definition mean that each MSFW assistance program has a unique target population, distinct outreach workers and intake forms, and usually separate facilities that may be able to serve some farmworkers but not others.

Moreover, migrant assistance programs have developed as a series of ad hoc initiatives run by different agencies. The result is a clear potential for overlaps in some services and gaps in others, and Congress has made inadequate provision for coordination among programs. Service providers generally concur that today's multifarious scheme probably would not be replicated if we were starting over to develop from scratch an overall strategy to meet migrants' special needs (for health care, education, nutrition, financial assistance, housing, job training, and the like). Although there is little support for wholesale redesign, activists, officials, and service providers usually agree on the need for better coordination so that limited funds may be used more effectively.

C. The Outline of this Report

This report analyzes regulatory barriers to coordination among migrant service programs and suggests ways to overcome them. Although its recommendations should have wider applicability, it focuses on what many persons called the "big four" MSFW programs: Migrant Education (ME), Migrant Head Start (MHS), Migrant Health (MH), and job training and ancillary services under section 402 of the Job Training Partnership Act (JTPA 402). These four programs together account for 90 percent of dedicated federal migrant assistance funds; ME alone counts for 56 percent. Although there is more coordination among these programs than existed in the past, those involved generally agree that coordination could be improved.

This report (1) explains the origin and rationale of, and current MSFW definitions used in, the federal MSFW programs on which it focuses; (2)

analyzes the impact of the definitions of eligible worker--and other features of the regulatory or institutional design--on state and local program administrators and on the persons served by the program; (3) investigates whether a more uniform definition of the eligible population would improve coordination, consistency, fairness, and efficiency in migrant assistance programs; (4) considers methods to encourage better coordination at the state and local levels; and (5) evaluates the desirability of a new federal body to foster coordination or otherwise to promote improvements in program operations and standards.

In addition to a study of the available literature and the legislative histories of the central programs, we conducted interviews of selected persons involved in these programs at the federal, state, and local levels. Our interviews included government officials at all levels (some involved directly in MSFW-specific programs and some with other responsibilities), officers and employees of grantee service providers and of their umbrella organizations, farmworker advocacy organizations, and farmers and farmworkers themselves. We also attended several hearings of the National Commission on Migrant Education, as well as a joint national conference of the chief service providers held in Buffalo in April 1991. At each location we were able to speak briefly with many of those who took part. With the assistance of the Administrative Conference of the United States, we also were able to schedule one meeting in Washington with a large number of key officials in the central offices of the chief federal programs, along with some persons from related nongovernmental organizations, to discuss issues of definition and coordination.

At times this was a difficult study to conduct. Migrant assistance programs are flexible federal programs that serve mostly poor and minority workers and their families. The services are generally provided by hard-working and dedicated people, putting in long hours for pay that is often far below what they might command in other endeavors, and in areas where the demand for services far outstrips supply. Some service providers regard evaluations or audits of the structure and functioning of their programs as hostile efforts by outsiders that will only make the provider's daunting mission more difficult, or else will afford rationales for further trimming of budgets that have already been reduced. In the face of extensive need, which can be met only partially in any event, the outsider's interest in definitions and efficiency can easily appear as uncharitable nitpicking. In many instances, there is a feeling that outside evaluators should simply acknowledge the expertise of providers to determine who should be served and how they should be served.

As a result of this understandable attitude among many service providers, questions about definitions and regulatory barriers were often met initially with skeptical queries about why and for whom the study was being done. (So as not to be misunderstood, we should emphasize that this reaction was by no means uniform. Most persons interviewed were most gracious and freely devoted considerable amounts of time toward assisting us in our understanding of their programs.) A few definition and coordination problems are immediately evident, but in other cases service providers raised legitimate questions about whether a uniform definition would solve their coordination problems--or at least would ameliorate them enough to make it worth the transition costs to some new, uniform definition.

D. Conclusions

This study concludes that coordination between MSFW programs could be improved with changes in program administration. As to definitions, although major restructuring of the programs to accommodate a new uniform definition would impose significant transition costs, some steps toward uniformity appear desirable and worthy. A more uniform definition would help reduce duplicative outreach and intake expenses, and, most importantly, would make it easier to estimate the target population of eligible migrant and seasonal workers and their dependents. Improvement in that capacity would reduce the frustration of service providers who report that the current wide range of MSFW target population estimates makes it hard to establish a definitive need for funding. We propose that the affected agencies agree on a core definition of migrant and seasonal farmworkers to be used initially as the basis for improved data-gathering, and that the Department of Labor, which has traditionally not estimated the number or distribution of migrant workers, develop a system to count farmworkers that is as reliable as its system to count workers in other industries and occupations. A uniform core definition, leading toward a better overall mapping of the target population, might also help to distribute available funds more effectively. Some programs currently allocate funds on the basis of persons enrolled or served, with no systematic provision for noticing when, for example, fruit and vegetable production starts up in a new area and draws a new population of MSFWs. Service providers may not catch up with the new distribution of workers for many years.

A uniform definition would also make it easier to coordinate services for MSFWs, but the successful examples of coordination at the state and local levels that we found indicate that coordination is possible even while definitions differ. In order to promote such coordination, and also to deal more effectively with a number of important interagency issues at the national level, the national-level coordination machinery should be improved. The possibilities for such improved coordination range widely, from a loose interagency task force through an executive branch coordinator all the way to a

Cabinet department centralizing all migrant functions. Though the question is close, we favor an improved interagency coordinating council, chartered by executive order, and charged with addressing certain specific priority coordination tasks.

II. The Major Programs: Background and Current Issues

A. Migrant Education

1. The Framework

a. The Chapter I Program for Disadvantaged Children

In the heyday of the War on Poverty, Congress passed the Elementary and Secondary Education Act of 1965, establishing a significant federal role in supporting education.[10] Title I of that Act set a basic funding pattern that has been continued to this day for the major portion of federal assistance. Grants are made, through the states, for aid to local education agencies (LEAs) on the basis of counts of school-aged children from low income families, largely based on decennial census figures. Once the funding is provided, however, in observance of the traditional local control over education in this country, LEAs have considerable discretion in choosing exactly how to use those funds, so long as they are used for supplemental services and facilities, as opposed to funding of the basic educational services of the school.[11]

The statute was reorganized and revamped by the Education Consolidation and Improvement Act of 1981 (ECIA), and then by the Elementary and Secondary School Improvement Amendments of 1988,[12] but the federal funding approach for educating the disadvantaged remains essentially the same under Chapter I, as it is now known. LEAs with a high concentration of children from low income families receive a federal supplement to use, for example, for additional teachers and aides, counseling and tutoring, inservice training for chapter I personnel, and a number of other measures. Chapter I funding of basic grants to LEAs for school year 1991-92 amounted to $5 billion.[13]

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[10] Pub. L. No. 89-10, 79 Stat. 27 (1965).

[11] Funding is based on figures showing low income families, because of studies showing a high correlation between poverty and educational disadvantage. Once the funding is set, however, children are to be served on the basis of educational disadvantage alone, without regard to income.

[12] Pub. L. No. 97-35, Title V, 95 Stat. 463-482 (1981), replaced by Pub. L. No. 100-297, 102 Stat. 293 (1988). The current version is codified in 20 U.S.C.A. §2701 et seq (West 1990).

b. The Migrant Education Program: Framework

In 1966 Congress determined that an additional special program for migrant education should be undertaken, based in part on concern that too much of the basic program was going to urban areas.[14] Unlike basic chapter I, the statute governing migrant education places primary responsibility on state educational agencies (SEAs), rather than local districts, "[b]ecause of the transient nature of the population."[15] The central migrant education grants, now known as Section 1201 grants, received an appropriation of $285.6 million for FY 1991, up from $274 million in FY 1990. This money was provided to the SEAs in the 49 states that now participate (all but Hawaii), plus the District of Columbia, Puerto Rico, and the Northern Marianas. SEAs have considerable discretion in structuring actual services and deciding on the precise uses of the funds.[16] They may pay for counselors, tutoring, additional aides, dropout prevention programs, prevocational training, medical and dental services, nutritional programs, transportation, training or counseling of parents, special summer schools (a particularly important element in upstream states, during some of the principal fieldwork months for the parents, in order to assist students to make up work missed over the regular school year), and a host of other initiatives. This great flexibility is a notable feature of the ME program. Moreover, the money comes on top of basic chapter I funding; one person interviewed called ME money the "supplement to all other supplements."

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[13] Dept. of Education Fact Sheet, Allocations for School Year 1991-92.

[14] Elementary and Secondary Education Act Amendments of 1966, Pub. L. No. 89-750, 80 Stat. 1191. See generally Interstate Migrant Education Council, Migrant Education: A Consolidated View 14 (1987); Congressional Research Service, Federal Assistance for Elementary and Secondary Education: Background Information on Selected Programs Likely to be Considered for Reauthorization by the 100th Congress, at 55-79 (prepared for the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor, Comm. Print, Serial No. 100-A, February 1987). Before 1966, a few initiatives for migrant education had been started under Title IIIB of the Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508. See S. Levitan, THE GREAT SOCIETY'S POOR LAW: A NEW APPROACH TO POVERTY 249 (1969) [hereafter cited as Great Society].

[15] House Comm. on Education and Labor, School Improvement Act of 1987, H.R. Rep. No. 100-95, at 36 (1987).

[16] The state directors of the 49 states where ME is active (all but Hawaii), have also established their own organization, the National Association of State Directors of Migrant Education (NASDME), to share information and ideas and to advocate better support for their programs.

In addition to the 1201 grants, section 1203 of the statute[17] provides for additional grants "to improve the interstate and intrastate coordination among State and local educational agencies of the educational programs available for migratory students." The FY 1991 appropriation for these purposes was approximately $9 million. The bulk of this money (some $ 6 million) goes for the Migrant Student Record Transfer System (MSRTS), discussed below, while the rest is used for grants and contracts that promote coordination, including modest funding for stopover sites and a new program to develop a better system for secondary education credit exchange and accrual.[18] For the last several years, the key element for coordination, however, has been a system of three Program Coordination Centers (PCCs), located in Texas, Oregon, and New York, funded at the level of approximately $2 million annually.[19] Each center has a staff of four or five professionals, and they run workshops, provide training, share curricular materials, and furnish other services aimed especially at helping states understand the curricula employed in other systems where their migrant students may spend part of the year, so as to mesh more effectively the educational programs the students experience. The ME office in Washington oversees this coordination activity through its Office of Program Coordination, staffed with approximately seven professionals. Most of the coordination activity of the office focuses on coordination among ME programs, but the staff also has responsibility for coordination with the other migrant service programs administered by other federal agencies.

As with other migrant assistance programs, some coordination among ME programs and with other agencies also derives from the work of umbrella organizations for ME grantees, especially the Interstate Migrant Education Council (IMEC) and the National Association of State Directors of Migrant Education (NASDME). IMEC is a 51-person organization of chief state school officers, ME directors, and federal, state, and local elected officials of the 16 states that include about 80 percent of all migrant children. Founded in 1976, it has been chaired since then by Representative William Ford (D-MI),

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[17] 20 U.S.C.A. §2783 (West 1990 & Supp. 1991).

[18] See 34 CFR Part 205 (1990). See generally Congressional Research Service, Background Information, supra note 12, at 73-79.

[19] These were meant to correspond roughly to the western, central, and eastern migration streams. Several ME officials acknowledged that the streams are not so neatly divided any more, but they still believed that three regional offices made these services more accessible than would be the case with only one centralized coordination office.

Chairman of the House Education and Labor Committee, and widely credited as the "father of ME." IMEC's purpose is to "disseminate information about the unique benefits of the migrant education program and the need for sufficient resources to carry out its mission."[20] Several persons also described IMEC as a device for raising the visibility of Migrant Education within SEAs. IMEC pursues these goals by educating public officials about the needs of migrant children, and by providing a forum for ME directors to interact with these officials. IMEC has a small staff that carries out the directives of the 32-member Council of elected officials and other nonME program members and a 19-member steering committee of ME-affiliated staff. IMEC publishes a newsletter, *Migrant Education Report*, and other occasional papers. It is funded by SEA contributions of $22,000 to $25,000 per state; its budget in 1992 is $400,000.[21]

NASDME is an unincorporated organization of state ME directors whose chair rotates among the states. NASDME meets quarterly, in order for state ME directors to exchange information and to promote coordination between ME programs in various states. State ME programs pay dues to NASDME to fund its operations, but data on these dues and NASDME's budget were not available to us. NASDME publishes a bimonthly periodical, *Migrant Education Messages and Outlook (MEMO)*, and hosts an annual conference. NASDME has devoted considerable attention to the MSRTS, focusing on strategies to improve delivery of timely, reliable and germane information. It has also tackled the problems involved in coordinating ME with other programs, and it has worked on school credit transfers and related issues.

c. The Funding Formula

States must apply for the §1201 ME grants and demonstrate compliance with certain criteria, such as assuring adequate evaluation, current needs assessments, and ample provision for parental involvement. Nevertheless, actual funding for each SEA derives in nearly automatic fashion from a formula based on the identified migrant student population in the state during the year. The statute specifies proportional counting of children present in the state only part of the year, in order to yield a full-time-equivalent (FTE) annual figure.

These required calculations pose problems, in part because it is hard to estimate the population of eligible migrant farmworker children. After some initial difficulties in 1966, the Office of Education used Department of Labor (DOL) estimates of the number of migrant farmworkers in each state. Even though it was aware of significant shortcomings in these data, at the time the office could find no better starting point for applying the statutory command. It then developed an estimate of the number of migrant school children per state by assuming .75 children per worker.[22] Clearly some more accurate measure was desirable.

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[20] IMEC, Annual Report 1990-91, at 5.

[21] California, Texas and Florida apparently contribute additional funds.

By 1972, all active states were cooperating in the use of the Migrant Student Record Transfer System (MSRTS). This system, based in Little Rock, Arkansas, was originally developed to provide for ready sharing of academic records among school districts as migrant students moved from place to place with their families, rather than to develop a census count of eligible children. The MSRTS system has encountered problems and serious criticisms,[23] but once it was fully operational, it provided far better data on migrant *students* than the DOL estimates of migrant workers. In 1974 Congress amended the statute to require, in essence, use of MSRTS figures in calculating the FTE figures on which state allocations would be based.[24]

The formula for deriving actual funding is quite complex, but the basic idea is that the federal supplement for each full-time-equivalent migrant child identified in the state will amount to 40 percent of the state's average per-pupil expenditure. This calculation is subject, however, to both a ceiling and a floor, to make sure that it will not fall below 80 percent, nor exceed 120 percent, of the national average per-child supplement.[25] For program year 1991-92 the statutory formula, had it been directly applied, would have generated federal grants to SEAs totalling $987 million. But because Congress appropriated only $286 million, the Office of Migrant Education first performed the statutory calculations, then reduced each state's allocation proportionately.[26] Although the formula itself (including the 40-percent benchmark) is not based on a precise assessment of educational requirements, these proportionate reductions to stay within appropriations ceilings lead to an oft-heard complaint that SEAs receive less than a third of the funding the statute says they need.

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[22] At the time of enactment in 1966, the Office of Education expected to be able to get such census estimates from health officials or the Office of Economic Opportunity. Allocation of all Title I money was delayed while the figures were sought, but the delays stretched beyond what anyone anticipated. Finally a reserve figure was chosen in advance of census estimates, so that the balance of the Title I appropriation could be released to states and LEAs. Only a few weeks later did the office decide to use DOL statistics as the best available (although they admittedly covered only workers under contract, not all migrant farmworkers). The multiplier of .75 used to estimate the number of migrant children then derived not from scientific analysis but from the fact that its application to DOL statistics happily resulted in a total spending figure just below the amount of funds that had already been set aside by the Commissioner for Migrant Education from the overall Title I appropriation. Interview with Patrick Hogan, Office of Migrant Education, August 1, 1991.

[23] See National Comm'n on Migrant Education, Keeping Up with Our Nation's Migrant Students: A Report on the Migrant Student Record Transfer System (MSRTS) 2, 6-8 (Sept. 1991).

[24] 20 U.S.C.A. §2781(b) (West 1990). The statute does permit the Secretary to use another system if he determines that it "most accurately and fully reflects the actual number of migrant students." The appearance of a rival to MSRTS under these conditions is thus highly unlikely.

[25] 20 U.S.C.A. §2781 (West 1990).

d. The Definition

The initial statutory provision was read to cover children only in the year following their parents' migration. As a result, migrant children whose families settled out of the migrant stream could no longer be served after 12 months of settlement. State migrant education directors consequently approached Congress and asked for authority to continue such services. They pointed out that the statute perversely terminated the assistance at a point when it might hold special promise of effectiveness, just when the student's life was taking on somewhat greater stability. Congress responded promptly, amending the statute in 1967 to extend the period of eligibility by another 5 years, if the parents concurred.[27] The legislative record discloses no particular reason for choosing the 5-year benchmark, rather than some other time period.[28]

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[26] Figures provided by the Office of Migrant Education. In very rough terms, the grants actually provided in program year 1991-92 worked out to a national average of about $500 per identified migrant student. This figure should be used, however, only to give an idea of the general order of magnitude of the funding received by states. Plainly the formula contemplates considerable variation state-by-state, and in any event, the funding is based on FTE calculations of identified migrant children in the state, not of those served.

[27] Elementary and Secondary Education Amendments of 1967, Pub. L. No. 90-247, §109, 81 Stat. 783.

[28] The Senate Committee explained the change to make formerly migratory children eligible for services with these words:

> Children who have been left with friends or relatives while the parents are migrating to areas where work is available, suffer from a cultural gap when enrolled in the local school system even after receiving services in their first year of residence in a community. They continue to encounter difficult language problems and are reluctant to attend school because their attire may be shabby. They experience difficulty in becoming involved in the regular school community. These children have problems in adjusting to the alien cultural and sociological climate of the school system. The committee's amendments to title I will make possible the continuity of effort needed for special migrant programs to dislodge these children from the migrant stream and integrate them successfully into the local educational system.

Sen. Comm. on Labor and Public Welfare, Elementary and Secondary Education Act Amendments of 1967, S. Rep. No. 726, 90th Cong., 1st Sess., at 13 (1967).

The current statute and regulations maintain this approach (see Appendix B, which sets forth the statutory and regulatory definitions for each of the major MSFW service programs), allowing services to "formerly migrant children" (sometimes simply called "formerlies") with the concurrence of the parents, for no more than 5 years.[29] In essence, this provision authorizes services for a total of 6 years after a "qualifying move," for 1 year as a "currently" and thereafter as a "formerly." The statute specifies, however, that currently migratory children "shall be given priority in the consideration of programs and activities"--a command that is implemented in different ways in different states, sometimes making little practical distinction.[30]

Apart from the lengthy "look-back" period ME employs (the longest of federal migrant programs), the ME definition is also among the more expansive.[31] It covers the children of parents employed in both crop and livestock agriculture, and also, by special statutory provision, those employed in dairy and fishery operations. The definition also extends to the children of migrant workers in packing and processing facilities, as well as the children of some persons who transport agricultural products. A qualifying move need only take one across a school district line, and the worker need not actually find farmwork in the new destination, as long as the move was undertaken with the *purpose* of finding agricultural work. This highly subjective element, requiring inquiry into the intent of the family at the time of the move, whatever the actual employment before or after, is open to manipulation. It sometimes causes problems for outreach workers, and it certainly complicates audits.

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[29] 20 U.S.C.A. §2782(b)(West 1990); 34 CFR §201.3(b)(1990).

[30] Id. Another expansion of the statute's coverage occurred in 1974, when the definition was extended to include the children of migratory fishermen. Pub. L. No. 93-380, §101(a)(2)(E), 88 Stat. 492 (1974). This change was triggered by a highly successful migrant education program in Mobile, Alabama, in the early 1970s. That program turned out, upon inquiry, to be serving mostly the children of migratory fishermen, apparently on the misapprehension that such fishing was a form of agriculture. One of the key teachers, however, was the sister of a congressman, who was asked to introduce the new definitional language in order to allow the continuation of the Mobile program. Interview with Patrick Hogan, supra note 20. The conference report, however, explained the addition of fisheries to the definition as the correction of a "technical deficiency." S. Conf. Rep. No. 93-1026, 93d Cong., 2d Sess., at 3 (1974). Children of migratory fishermen now make up less than 3 percent of the population served.

[31] After the Reagan Administration proposed more restrictive definitions of some key terms, Congress mandated by statute the continuing use of earlier regulatory definitions. The current such provision appears in 20 U.S.C.A. §2782(c) (West 1990).

2. Current Issues

ME claims the largest portion of the federal migrant assistance budget, and probably comes in for the largest share of questions and complaints from the general community of MSFW service providers. Those questions most often voiced in the course of our interviews are summarized here.

a. Funding for Population and Not for Services

Migrant Education's formula for distributing funds to the individual states is based on the MSRTS count of FTE eligible children within state boundaries, without direct reference to how many of that population actually receive services. In program year 1990, for example, when the MSRTS eligible figure exceeded 556,000, a Migrant Education Fact Sheet reported approximately 250,000 children served.[32] Other more detailed reports, however, appear to establish that the number of children served exceeded 350,000.[33] Even the latter number is subject to question, however, because it may include double counting of children who had access to services in more than one state.

However one evaluates these statistics, this feature--allocating funds on the basis of population counts rather than service counts--surpassed any other in drawing criticism from officials and activists involved in other migrant service programs (occasionally ME officials reflected some doubts on this score as well). Other programs usually have performance standards that include requirements for detailed accountability, and they must link their grant proposals closely to the number of persons served. One Migrant Head Start official observed: "The principal use of MSRTS frequently appears to be the identification of children to generate dollars for migrant education rather than the utilization of a system to work more effectively with children to promote their educational development and health maintenance."[34]

ME officials defend the formula, arguing that it provides an incentive for finding and identifying migrant children. As a result, most state or local ME programs have significant staffs devoted to recruitment or outreach.

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[32] Fact Sheet, FY 1990, Office of Migrant Education, at 1: "The number of migratory children served has grown from 80,000 in 1967 to 250,000 in 1981 and has remained fairly constant since then."

[33] Maria V. Colon & Marlene Portuondo, Secondary Analysis of Selected Data on Migrant Education Programs, Fiscal Year 1990, Table G (Report prepared for the National Commission on Migrant Education, March 1, 1991). This table gives a figure of 359,996 served in the regular school year, as well as a figure of 126,796 served in summer school. Both figures contain an undetermined amount of double-counting, however, owing to the fact that some students receive services in more than one district over the course of the year.

[34] Testimony of Geraldine O'Brien, Executive Director, East Coast Migrant Head Start Project, to the National Commission on Migrant Education, April 29, 1991, at 4.

Proponents of the formula argue that services are generally made available once any significant concentration of migrant students is identified, and they point out that services certainly will not be provided if the students are not located.[35]

Critics also complain about the way the MSRTS system generates FTE counts. Even if MSRTS records show that a student has withdrawn from a school system, she remains within that state's count until she is picked up by a system in a different state and that state notifies MSRTS of the enrollment there.[36] Supporters defend this practice, however, based on a judgment that the student may simply have dropped out of school, could still be in the area, and should be the object of efforts to draw her back in. If she has actually moved elsewhere, she cannot remain on the rolls for longer than about 12 months in any case, for the regulations[37] require annual updating of information on the certificate of eligibility. The dropout phenomenon doubtless sometimes does account for recorded withdrawals without later pickups in other school systems. But quite often the student may well have moved to another state that was simply slow in the paperwork or failed to note the student's status as a migrant.

Moreover, this slow removal from MSRTS counts may at one time have worked to the special advantage of stopover states. Several people asserted that Arkansas, in particular, provides an attractive stopover site for migrants moving north from Texas, and is assiduous in enrolling migrant children with the Little Rock-based MSRTS during their brief stay there. This practice generates disproportionate FTE counts for Arkansas, because some of the migrant children will never be picked up in another state system, and the reporting of others' moves to MSRTS may be delayed by weeks or months. In its latest regulations, however, the Department took steps to minimize this practice by stopover states.[38]

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[35] Moreover, it should be noted that basing funding on population counts has not, for nearly a decade, resulted in added overall funding for the Migrant Education program. Ronnie E. Glover, the President of NASDME (the National Association of State Directors of Migrant Education) observed in a letter commenting on an earlier draft of this study:

> In theory our funding may be based on number of children identified, but in reality, since 1981, our funding is based on a line item appropriation. To the best of my knowledge, this is the same basis on which all other programs receive funding.

Letter from Ronnie E. Glover to Jeffrey Lubbers, ACUS, Feb. 7, 1992. (Even though added identification of migrant students probably will not increase the national appropriation, however, a potential for some distortion remains, because a state still can improve its relative position vis-a-vis other states in the annual allocations.) The Glover letter also expressed doubt that a change to funding based on actual numbers served would make much difference in state allocations, owing to the current requirement to serve all migrants, with the priority going to those in greatest need. Finally, it also voiced concern that such a change might instead force a reduction in services, especially to those in greatest need, as states tried to stretch resources to serve higher absolute numbers.

[36] The rules are slightly different for summer school, which is subject to special funding arrangements and counting rules under 20 U.S.C.A. §2781(b) (West 1990).

[37] 34 CFR §§201.30 - 201.32 (1990).

b. "Formerlies" and "Currentlies"

Many people raised questions about the lengthy look-back period employed, allowing services for up to 6 years after a qualifying move. ME officials, teachers, and supporters usually justify the practice by pointing out that the effects of educational disruptions may linger for years. In their experience, there is no significant difference between the formerlies and currentlies in their classrooms or among those in their counseling or tutoring sessions.[39] Moreover, it was argued that a shortening of the eligibility might only tempt some families to rejoin the migrant stream in order to restart their children's eligibility for ME services.

Critics concede that needs may persist long after a family settles out of the migrant stream, but they suggest that at some point (before the 6-year mark) the needs of settled ex-migrant children are not significantly different from those of other disadvantaged students. Basic Chapter I funding exists to provide services for such children.[40] And they argue that a reduced eligibility period would not afford any undue incentive to renew migrancy, because from a settled-out family's perspective ME services usually are not sharply segregated from other services available through the local school system or elsewhere.

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[38] 34 CFR §201.20(a)(3) (adopted in 1989).

[39] See Glover letter, supra note 33: "All the objective data we have, including information from MSRTS and a comprehensive needs assessment in California, indicates that the needs of formerlies are, on average, at least 90 to 95 percent as great as those of currentlies."

[40] The President of NASDME responded to such suggestions:

> Of course we want these "settled-out" children to be "picked up" by Chapter 1 basic and other programs, but in reality the Chapter 1 programs are often not the solution. For children who do not know English well enough to benefit from a Chapter 1 reading lab, or whose principal problem is that they are 16 years old and in the ninth grade, Chapter 1 is not a viable alternative. Even for those children whose needs could be addressed by Chapter 1 there is no assurance of access to those services; Chapter 1 can serve only about half the children who are eligible anyway.

Glover letter, supra note 33. (Any Chapter 1 program that is failing certain students in these ways, however, might well be out of compliance with the governing statute; it is not clear why the remedy should be continued ME coverage rather than specific remedies within the context of Chapter 1.)

At the time when it was adopted in 1967, the statutory change that expanded coverage to formerlies held no implications for funding, because state allocations then were based on DOL estimates of currently active migrant farmworkers, state by state. The expansion of eligibility at that time allowed only a continuation of services, not an increase in some states' funding. But when the statute changed in 1974 to base state allocations on the MSRTS count of all eligible children in the state, the 1967 amendment to include "formerlies" took on a new significance that has never been fully considered in Congress.

The need for such reflection has become more pressing as a result of demographic shifts. Those states that claim the highest allocations of the §1201 grants also have very high proportions of formerlies. California, in particular, claimed over one-third of the national appropriation available for §1201 grants, and over 50 percent of its eligible population consists of formerlies.[41] Some of the formerlies, moreover, never did fit the stereotypical image of follow-the-crop migrants. Their ranks include, for example, Southeast Asian refugees who moved but one time (after their initial resettlement in the United States) to central California to take up truck farming on small plots owned by extended family members. That one move was "qualifying"; it fits the ME definition, for it was undertaken "to enable [a family member] to obtain temporary or seasonal employment in an agricultural . . . activity."[42] Though they plan no further movement, their children then bring California added funding for the next 6 years.[43] Again without doubting the existence of bona fide educational need on the part of these children, critics question whether their inclusion on migrant rolls, skewing funding to the heavy advantage of California--and other similarly situated states--provides for the best use of the limited ME resource. (Other special federal programs exist for the specific purpose of assisting the education of refugee children.)

We found some slight indications of a willingness on the part of ME officials in Washington to consider a reduction in the look-back period, possibly to as little as 24 months, in the interests of moving toward a more uniform definition. But most people involved in ME programs stoutly defend the option to provide services for a full 5 years after a qualifying move.[44]

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[41] Office of Migrant Education, Fact Sheet FY 1990 (Table Headed "Final Allocation Migrant Education, in Rank Order, Program Fiscal Year 1990, 1201 Funds," June 6, 1990).

[42] 34 CFR §201.3(b) (1990).

[43] For example, the Fresno, California ME program serves 22,000 ME students, including 10,000 Asians in Fresno city schools (interview with Andy Rodante, Feb. 4, 1992). Farm employers and farmworker advocates assert, however, that Asians have never been even 5 percent of the area's migrant farmworkers.

A middle path, proposed by some, may be worthy of consideration--a kind of return to the pre-1974 situation, which was arguably more in keeping with the initial purposes behind special federal programs for migrant education. Funding might be based on a state count that includes only current migrants, or current migrants plus those in the first year of settling out.[45] But the statute could still allow states, at their option, to include formerly migrant students in the services. Any such change would of course bring significant political fall-out, for it would clearly shift resources from states like California and Texas toward those where a currently migratory workforce is more prevalent.

c. Age Ranges

In 1988, the statute was amended to count migrant children aged 3 to 21 inclusive for funding purposes. The House report that accompanied the amendment explained:

> Currently, States may serve children between the ages of 3 and 21, but only those migrant children between the ages of 5 and 17 are counted for funding purposes. By expanding the age range being counted for funding purposes, the committee hopes to draw attention to the need to correlate to some degree those children who are served with the amount of funding provided.[46]
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> Ironically, the change may instead have reduced the correlation between services and funding. The earlier range, from 5 to 17, corresponded fairly closely with the usual ages of local school attendance in most districts. Although service was authorized for younger and older children, it was not the

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[44] For a discussion of earlier battles over this same terrain, launched by an early Reagan Administration proposal to reduce the period from 5 years to 2 years, see Lyke, Proposed Changes in Federal Programs for Migrant Education 22-26 (Congressional Research Service, March 18, 1983). The proposal was not accepted by Congress.

[45] Alternatively, the FTE formula could be weighted to provide only partial credit, for funding purposes, for formerlies, while giving full weight to the count of currently migratory children. None of these alternative systems would require significant changes in MSRTS data-gathering, for each student is already registered as a currently or a formerly. (On the forms, Status 1 and 2 are reserved for currently migratory agricultural workers, while all formerly migratory agricultural workers and their families are recorded in Status 3.)

[46] H.R. Rep. No. 100-95, supra note 13, at 37.

> norm. Moreover, SEAs often will not need to create new programs targeted at such young children or older youths in order to include them in their counts. The eligibility documents filled out by ME recruiters are supposed to show the names and ages of other members of the family, whether or not they are in school. Siblings 3 to 5 or 17 to 21 can now generate added federal funding, whether or not they are served and whether or not they were located through additional targeted outreach.

The expanded age range also compounds the problems of overlap with Migrant Head Start, which traditionally serves children from shortly after birth through age 5. One MHS head interviewed, who operates a program that must turn away substantial numbers of eligible preschoolers for lack of resources, expressed some bitterness at the indifference of the local ME office to preschool children. Despite its wider mandate, he said, ME would not think of transferring its funds to enable MHS to serve a larger population. The two were like "separate empires." When the local ME head was asked what his office was doing to serve the younger children, in view of the new statutory provisions, he mentioned only a summer school to help prepare those who would be entering kindergarten the coming fall--that is, children already 5 years old or approaching that age. This implies no wrongdoing on the part of ME; by all appearances the ME monies provided to the district were effectively employed, but with a focus on children 5 and older. The episode simply underscores the potential mismatch of the population counted for funding purposes with the population actually served. (In some other states, of course, ME and MHS have worked together more effectively to integrate their services.[47])

Moreover, this tendency toward expanding the clientele of MSFWs to be served, particularly with regard to age ranges, appears to be endemic to every MSFW program. Interagency coordination can be adversely affected as a result. Any new coordinating body should therefore take this tendency into account and develop techniques to counteract it--or at least to subject any expansions to closer interagency scrutiny before they take effect.

d. Coordination

The ME statute contains two specific provisions relating to coordination. Section 1203, discussed above, focuses on coordination among states' ME programs and between states and LEAs.[48] The other provision is more important for our purposes. Section 1202(a)(2) allows the Secretary to approve a state ME application only if he determines, *inter alia*:

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[47] See, e.g., National Migrant Resource Program, Integration and Coordination of Services at Migrant Health Centers, at III-24 (Feb. 28, 1992) (describing ME and MHS cooperation in programs involving the Illinois Migrant Council).

> that in planning and carrying out programs and projects there has been and will be appropriate coordination with [the HEP/CAMP programs described below], . . . the Education of the Handicapped Act, the Community Services Block Grant Act, the Head Start program, the migrant health program, and all other appropriate programs under the Departments of Education, Labor, and Agriculture.[49]
>
> This measure dates back to 1966, when it referred to migrant programs authorized under the Economic Opportunity Act, but it has gradually been expanded over the years to reflect reorganization of migrant programs and eventually to specify a wider range of programs with which coordination must be accomplished. No one interviewed contested the desirability of such coordination. But some ME officials bemoaned the absence of parallel requirements in the organic statutes governing the other migrant service programs, fearing that the other agencies, lacking similar statutory requirements, would not have the same interest in coordination. This fear is probably exaggerated, however, for other programs have incorporated coordination requirements in their performance standards.

3. HEP and CAMP

The Office of Migrant Education in the Department of Education also oversees other programs meant for migrant farmworkers or their families. The most important are the High School Equivalency Program (HEP) and the College Assistance Migrant Program (CAMP), which fund projects designed to help migrant students complete their secondary schooling and their first year of college, respectively.[50] These programs were originally established as discretionary grant programs of the Office of Economic Opportunity (OEO), HEP in 1967 and CAMP in 1972.[51] In 1973 the director of OEO delegated responsibility for the programs to the Secretary of Labor, and in 1978 Congress established express authority for the programs under §303(c)(2) of the Comprehensive Employment and Training Act (CETA).[52] Their administration was transferred in 1980 to the newly created Department of Education, and later that year authority for the programs was removed from CETA and incorporated into the Higher Education Act of 1965, as amended.[53] FY 1990 appropriations for HEP totalled $7.9 million and for CAMP $1.7 million.[54]

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[48] 20 U.S.C.A. §2783 (West 1990 & Supp. 1991). This section also authorizes funding for the MSRTS system and sets aside a minimum of $6 million for these various coordination contracts.

[49] 20 U.S.C.A. §2782(a)(2) (West 1990 & Supp. 1991) (statutory cross-references omitted).

[50] In addition to HEP and CAMP, the Office also oversees the Migrant Even Start Program, a relatively recent addition to the list of educational assistance programs for migrants. 20 U.S.C.A. §§2741-2749 (West 1990 & Supp. 1991). As part of a larger Even Start program launched in

HEP provides grants to colleges and universities, or private nonprofit organizations that work in cooperation with a college or university, to help

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1988, it provides funds, through project grants to SEAs, to meet the special educational needs of migratory children and their parents by integrating early childhood education and adult education into a unified program. As of March 1991 Migrant Even Start had four grantees (in New York, Louisiana, Oregon, and Washington), and it received an FY 1991 appropriation of $1.5 million, up from $726,000 in FY 1990. (The legislation reserves 3 percent of the total appropriation for the migrant portion of Even Start. 20 U.S.C.A. §2743(a)(1)(A).) Eligible migrants include parents eligible for participation in an adult basic education program and their currently migratory children ages 1-7 inclusive. Formerly migratory children can also be included if space is available. See Office of Migrant Education, Directory of Services: Federal Agencies and NonFederal Organizations Providing Services to Migrant and Seasonal Farmworkers and Their Families 11 (March 1991); 34 CFR §212.50 (1990). The relevant definitions, id. §201.3, are the same as those used by the regular Migrant Education program.

The Department of Education is also authorized to provide adult literacy grants to the states under 20 U.S.C. §1201. Under certain conditions the statute specifically authorizes the reservation of up to $3 million a year from appropriated funds to be used for "national programs," which includes, under id. §1213, programs "to meet the special needs of migrant farmworkers and immigrants." See 34 CFR Part 436. The definitions define "migrant farmworker" to include only those who have moved within the past 12 months. 34 CFR §425.4. In FY 1990 and 1991, however, no funds were made available for migrant adult literacy programs. Directory, supra, at 14.

Brief mention should also be made of a special program to provide vocational rehabilitation services for handicapped MSFWs and their family members, authorized by the Rehabilitation Act, 29 U.S.C. §777b. Slightly over $1 million was appropriated for this program in 1990. Directory, supra, at 13.

[51] See Great Society, supra note 12, at 249.

[52] Pub. L. No. 95-524, §2, 92 Stat. 1909 (1978), amending Pub. L. No. 93-203, §303, 87 Stat. 839 (1973). See Lyke, The College Assistance Migrant Program and the Migrant High School Equivalency Program 2-3 (Congressional Research Service, June 27, 1986).

[53] 20 U.S.C.A. §1070d-2 (West 1990).

[54] In program year 1985-86, federal expenditures per student enrolled in HEP projects ranged from $905 to $3,842, with an average of $2,190. For CAMP the range was $1,819 to $5,900, averaging $3,038 per student. Lyke, supra note 42, at 5.

MSFWs or their dependents (at least 17 years of age) to obtain a high school equivalency diploma. HEP funds may be used for outreach and recruitment of eligible beneficiaries, educational services, and a wide range of supportive services, including counseling, health services, room and board (most HEP students live on college campuses during the program), and weekly stipends for personal expenses.[55] Grants are awarded on a 3-year cycle, through a competitive process that is not directly tied to migrant population in the area--thus sharply distinguishing the program from basic ME §1201. As of November 1990 there were 23 HEP grantees, located in 16 states and Puerto Rico.[56]

CAMP operates quite similarly, based on a competitive grant process with a 3-year grant cycle. It is meant to assist eligible MSFWs and their dependents to begin college studies. Funds may be used for outreach and recruitment aimed at such persons "who meet the minimum qualifications for attendance at a college or university." Thereafter, during the first year of college, funds may be used for instructional services such as counseling and tutoring, housing support, assistance in obtaining financial aid, health services, exposure to cultural events, and a variety of other services.[57] As of November 1990, there were six CAMP grantees, located in 5 states.

The definition that governs in both HEP and CAMP differs significantly from the basic ME definition. Both migrant and seasonal farmworkers (and dependents) are covered, but the worker must have spent a minimum of 75 days over the past 24 months in farmwork. The regulations add a requirement that the worker's *primary* employment was in farmwork, but the farmwork must be "on a temporary or seasonal basis (that is, not a constant year-round activity)."[58]

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[55] 20 U.S.C.A. §1070d-2(b) (West 1990). See also 34 CFR Part 206 (1990).

[56] Directory, supra note 48, Appendix C.

[57] 20 U.S.C.A. §1070d-2(c) (West 1990); 34 CFR Part 206 (1990).

[58] 34 CFR §206.5(c)(7) (1990). Migrants are defined as seasonal farmworkers "whose employment required travel that precluded the farmworker from returning to his or her domicile (permanent place of residence) within the same day." Id. §206.5(c)(6).

B. Migrant Health

1. Legislative History

Migrant Health is the oldest of the major federally funded migrant service programs. A House committee report explained the need for special federal measures, pointing to studies that

> continue to show high infant mortality rates, high communicable disease rates, low prenatal care rates, high premature birth rates, high accident rates, low immunization levels, serious need for dental care, low economic and educational levels, mobility and lack of resident status leading to geographic and eligibility isolation from medical facilities, plus cultural factors and language barriers contributing to the health problems of migrant and seasonal agricultural workers and their families.[59]

In the early 1960s the Senate Subcommittee on Migratory Labor was considering several bills dealing with topics such as child labor, housing for migrant workers, and crewleader registration. Senator Harrison Williams, who chaired the committee, was approached with suggestions that instead that body might begin with legislation on migrant health, believed likely to generate less controversy and to gain wider support. This strategy worked, and in September 1962 Congress passed without dissent a simple and straightforward bill adding a new section 310 to the Public Health Service Act. The law authorized up to $3 million "for paying part of the cost of . . . family health service clinics for domestic agricultural migratory workers and their families," as well as other special projects.[60] Congress appropriated only $750,000 for the first fiscal year of operation, but the program soon showed significant results, and congressional support grew apace, to $7.2 million in FY 1967 and $14.0 million in 1970. The FY 1991 appropriation was $51.7 million, up from $48.5 million in 1990.[61]

Because of limited funding, early efforts targeted preventive health services such as immunizations, health education, and environmental safety programs.

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[59] H.R. Rep. No. 91-711, 91st Cong., 1st Sess., at 2 (1969).

[60] Pub. L. No. 87-692, 76 Stat. 592 (1962). The background is recounted in H. Johnston, Health for the Nation's Harvesters: A History of the Migrant Health Program in its Economic and Social Setting 135-39 (1985).

[61] National Association of Community Health Centers, Inc., Migrant Health Program Funding History: Fiscal Years 1963-1991 (mimeo 1991).

Many recipients of federal grants also modeled their clinics on a program in Fresno County, California, which had emphasized accessible locations and evening hours so as to reach the migrant farmworker population more effectively. The clinics then relied to a large extent on referrals to local cooperating physicians.[62] Increased appropriations eventually allowed the provision of a wider range of services and the construction and later expansion of a network of clinics dedicated to serving migrants. Under the current version of the migrant health authorization, now located in section 329 of the Public Health Service Act, grants may be used for both ambulatory care and hospital services, as well as a host of other measures, where appropriate, including dental services, extended care, rehabilitative services, and necessary transportation.[63]

Until 1970, only migrant farmworkers and their dependents were eligible for services under the Migrant Health program. An amendment that year added seasonal farmworkers to the eligible population, because they face many of the same health problems and may "live side by side in the same community." Moreover, "their status as seasonal workers and as migrant workers frequently shifts back and forth."[64] Congress recognized that this change expanded potential eligibility manyfold, but the legislative history emphasized that the focus still remained on migrants. Services could be provided to seasonal agricultural workers and their families in a project only if the Secretary found that providing such services would contribute to the improvement of the health conditions of migrants. The conference report underscored this limitation.[65]

In 1975, Congress rewrote the Migrant Health authorization and added a great many detailed requirements for the establishment and operation of migrant health centers, including, for the first time, statutory definitions of "migratory" and "seasonal" agricultural worker.[66] Current law essentially follows the 1975 pattern, although there have been frequent refinements since then. The Act and the regulations retain a strong emphasis on service to migratory as opposed to seasonal farmworkers, through a set of defined funding priorities that are linked to the number of migrants in the clinic's "catchment area."[67]

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[62] See Johnston, supra note 58, at 151; General Accounting Office (GAO), Problems in the Structure and Management of the Migrant Health Program 3-4 (HRD-81-82, May 8, 1981).

[63] 42 U.S.C.A. §254b(a) (West 1991).

[64] H.R. Rep. No. 91-711, supra note 57, at 3. The legislation that year was contained in Pub. L. No. 91-209, 84 Stat. 52 (1970). Before that time, migrant clinics had often provided services to seasonal farmworkers, but had to assure that funding for such services came from other sources.

[65] Conference Report No. 91-853, 91st Cong., 2d Sess., at 3 (1970), stated:

> This provision is intended to be restricted in its applicability to projects in areas where migratory workers reside, and is to be limited to projects which will improve the health conditions of migratory workers themselves.

[66] Pub. L. No. 94-63, 89 Stat. 304 (1975).

The definitions (see Appendix B) define as migratory or seasonal agricultural workers only those whose "principal employment" is in agriculture on a seasonal basis.[68] (Interviews indicated that intake workers usually rely on the individual's own statement about the primacy of agricultural employment, and do not spend much time or effort in checking this issue.) A migrant, one who establishes "a temporary abode" for such employment, must have been employed in such work within the last 24 months. This 24-month look-back period is considerably shorter than that for Migrant Education, but of course migrants who have settled out for a longer period may still be served as seasonals, provided they retain their principal employment in agriculture. Such people will not count, however, for purposes of establishing the migrant population used in calculating funding priorities. "Agriculture," for Migrant Health purposes, includes only crops, not livestock, and it embraces processing, packing and similar activities only if "performed by a farmer or on a farm incident to or in conjunction with" primary growing or harvesting activity.[69] The committee reports accompanying the 1975 amendments, which adopted these definitions, offer no explanation of the reasons for choosing a 24-month period or defining agriculture in this fashion.[70]

In addition to the funding for Migrant Health Centers (MHCs) under what is now section 329 of the Public Health Service Act, Congress began in 1975 a separate program of federally funded Community Health Centers (CHCs) for "medically underserved" areas, under a new section 330 of the Act.[71] The range of services that can be funded is quite similar to that available under section 329, and most migrant health catchment areas also qualify as "medically underserved." As a result, many Migrant Health centers also apply for and receive funding under section 330 as well.[72] There have been periodic efforts, most recently in the early Reagan administration, to repackage federal health care initiatives as block grants that would give the states far more discretion in deciding how to use their federal health funding. Congress has strongly resisted including migrant health in such packages, however, fearing that states would not accord sufficient priority to migrant programs if such a change were made.[73]

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[67] 42 CFR §56.107 (1990). See also 42 U.S.C.A. §254b(b) (West 1991). Since 1978, migrant health clinics may also serve former migrants who no longer meet the definition because of age or disability. Id. §254b(a)(1). Migrant Health published in 1990 an atlas of state profiles containing a detailed breakdown of migrant and seasonal farmworker population in each state served, as estimated (according to varying methodologies) by organizations in the states served by MH. Migrant Health Program, An Atlas of State Profiles Which Estimate the Number of Migrant and Seasonal Farmworkers and Members of Their Families (March 1990).

[68] 42 U.S.C.A. §254b(a)(2), (3)(West 1991).

[69] 42 U.S.C.A. §254b(a)(4) (West 1991).

[70] See, e.g., S.Rep. No. 94-29, 94th Cong., 1st Sess., at 106 (1975) (simply describing the definitions adopted in the legislation).

[71] 42 U.S.C.A. §254c (West 1991).

2. Institutional Framework

The Migrant Health Program is a branch of the Division of Primary Care Services in the Bureau of Health Care Delivery and Assistance of the Department of Health and Human Services (HHS). Its central office consists of four or five professionals, plus support staff, who have broad oversight and policy responsibility. Actual approval of migrant health center grant applications and detailed program monitoring are decentralized to the 10 HHS regions, carried out by staff that report to the Regional Health Commissioners, not to the Migrant Health Branch. One staff member in each region is designated a Migrant Regional Program Consultant, but none of those consultants is able to devote full time to Migrant Health.[74]

The bulk of the annual appropriation for Migrant Health goes to the migrant health centers. As of 1990 102 MHC grantees operated some 400 clinic sites in 43 states and Puerto Rico.[75] Centers must undergo a competitive application process at least every 5 years, and must gain approval of "continuation" applications annually.[76] Some attention is given to shifting migrant populations in this process, particularly through reviewing the past year's productivity statistics for the centers; productivity is likely to decline if the migrant or seasonal population in an area is shrinking based on changing agricultural patterns or practices. But persons interviewed acknowledged the system's limited capacity for responding to major shifts in migrant health needs across areas. Limited funding in recent years has generally precluded the opening of new centers in previously unserved areas even if the central office knows of new migrant activity. And there is no systematic arrangement for keeping track of such shifts in agricultural employment, particularly in areas outside the reach of existing centers.

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[72] A GAO study reported that by 1979 63 percent of MH grantees were also funded under section 330. GAO, supra note 60, at 11.

[73] See, e.g., S.Rep. No. 91-618, 91st Cong., 1st Sess., at 3 (1969). Johnston, supra note 58, at 167-68, quotes a Congressional statement announcing "unanimous agreement that the [federal migrant health] program had been successful, and that this success could be attributed to the program's separate identity that could be jeopardized by a merger with other programs."

[74] Interview with Jack Egan, Acting Director, Migrant Health Program (Oct. 21, 1991).

[75] Migrant Health Program (fact sheet, 1991); National Ass'n of Community Health Centers (NACHC), Medicaid and Migrant Farmworker Families: Analysis of Barriers and Recommendations for Change 1 (July 1991).

[76] Egan interview, supra note 72.

Such a gap does not necessarily mean that migrants in these other areas will be without subsidized medical services. In many areas, health facilities locally known as migrant health clinics (including some in areas of high MSFW concentration in California and elsewhere) are not technically part of the federal Migrant Health program. These clinics receive no section 329 funds, relying instead on state and private sources, or on other federal support (such as section 330 or Medicaid).

In any event, MHCs themselves almost always rely on substantial funding from other sources (in addition to community health center funding under section 330 of the Public Health Service Act, for which a high percentage of MHCs qualify). They turn, for example, to state and local government grant or contract programs, church or other private support, Medicaid, private insurance, and patient fees.[77] Indeed, this feature merely reflects the great emphasis that the American system of service provision, relying as heavily as it does on private nonprofit organizations, places on such initiative of a quasi-entrepreneurial character. Those organizations that are most creative in finding new funding sources and perhaps--in that process--branching out into new but related fields of activity, will be best situated to sustain and expand their operations.

In addition to the funding of the MHCs, the central office of Migrant Health selects for special funding certain projects with wider impact. These include, for example, the East Coast Migrant Health Project, which recruits multilingual health care staff and outreach workers to work on a temporary basis during the peak season in various centers along the east coast, and the National Migrant Resource Program (NMRP), based in Austin, Texas. NMRP houses a library of studies and articles relevant to migrant health that can be drawn upon by all MHCs. NMRP has also spearheaded several other useful initiatives, including the development of a Migrant Clinicians Network and, under that umbrella, the generation of migrant-specific protocols to assist doctors and nurses dealing with this population.[78] NMRP has also worked on issues of coordination among migrant health programs in various states, and with migrant service programs of other agencies. For example, its staff worked for many years to incorporate more complete and useful health records into the MSRTS data system. (This effort ultimately failed, due to database, confidentiality, and access problems; NMRP is now looking to other techniques for providing easily transferable and readily usable medical records.) Beyond these purely MH initiatives, the central office has arranged with the Health Care Financing Administration for pilot funding of hospitalization programs, primarily for maternal and emergency care, at selected locations.[79]

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[77] Interview with Dan Cardenas, National Ass'n of Community Health Centers, October 21, 1991. No eligible MSFW may be turned away for inability to pay, but the centers may and do charge on a sliding scale that takes into account the resources of the patient or his or her family.

[78] See also National Migrant Resource Program, Migrant and Seasonal Farmworker Health Objectives for the Year 2000 (April 1990).

3. Coordination

Migrant Health has especially good working relationships with Migrant Head Start, for there is a natural match, in many localities, between the two programs. MH can provide the necessary health screening and treatment for children entering Migrant Head Start, and Head Start can also help MH to contact the children's families and so begin providing health services to them. In 1984, MH and MHS entered into a 3-year interagency agreement to coordinate at the national level and to foster coordination at the local level.[80] Although the agreement apparently has lapsed, efforts are underway to renew it, and in any event a majority of MHS grantees report formal or informal agreements at the local level.[81] In some states this kind of symbiosis has also flourished between MH and Migrant Education. Most of this coordination results from efforts at the local level, however, because MH is simply not staffed, at either the national or regional levels, to provide extensive initiatives for interagency coordination.

Nevertheless, MH has been highly supportive of better interagency coordination. It took the lead in efforts in 1985 to establish an interagency coordination body (discussed below), and MH personnel and associated organizations have been quite vocal in calling for more structured coordination at the national level. The National Advisory Council on Migrant Health, for example, has called for the creation of "an Interagency Migrant Commission which exists at not less than the *Cabinet* level."[82] Sonia M. Leon Reig, Associate Bureau Director in the HHS Bureau of Health Care Delivery and Assistance, and formerly director of Migrant Health, testified before the National Commission on Migrant Education in favor of a Commission or Consortium, to be established at the "highest possible level, such as the White House," to "conduct short-term applied research, to prioritize and strategize solutions to common problems and to mobilize resources."[83] She also advocated a uniform definition of migrant farmworker, and she urged concerted efforts to eliminate duplication of activities, including mandated transfer of funds from one program to another to focus the responsibility for providing specific services.

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[79] Egan interview, supra note 72. This initiative reflects the difficulties migrants often have in making use of Medicaid, which should generally cover hospitalization costs for those who meet the low income requirements, as migrants generally do. Migrants often find Medicaid difficult or impossible to employ, because of state residency requirements or simply because of paperwork delays that outlast their relatively brief stays. Reform of Medicaid to allow special eligibility requirements for migrant farmworkers, readily transferable as they move state to state, or to permit simplified application and approval, has therefore become a high priority for Migrant Health and affiliated organizations. See, e.g., National Advisory Council on Migrant Health (NACMH), 1990 Issues and Recommendations at A-1 - A-2; Farmworker Health for the Year 2000: 1992 Recommendations of the National Advisory Council on Migrant Health 23 (1992); NACHC, supra note 73.

[80] Testimony of Frank Fuentes, Chief, Migrant Programs Branch, Administration of Children and Families, Dept. of Health and Human Services, before the National Commission on Migrant Education, April 29, 1991, at 17.

[81] Id. at 12, 17.

C. Migrant Head Start

1. Statutory Framework

Project Head Start, of which Migrant Head Start is a component part, began in 1965 under the general statutory authorities granted by Congress to the Office of Economic Opportunity.[84] In 1969 OEO delegated responsibility for Head Start to what was then the Department of Health, Education and Welfare (HEW). Congress enacted a more specific statutory authorization in 1974,[85] and then revised and reenacted the "Head Start Act" as part of the Omnibus Budget Reconciliation Act in 1981.[86] The program is now administered by the Head Start Bureau, which is located in the Administration for Children and Families, Department of Health and Human Services (HHS).

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[82] NACMH, supra note 77, at A-4. In addition to NACMH, the National Council of Community Health Centers (NACHC) also serves as an umbrella organization watching out for the collective interests of migrant health clinics and attending to the need for better interagency coordination. In this respect these organizations are roughly the Migrant Health analogues of IMEC or NASDME for ME grantees.

[83] Testimony of Sonia M. Leon Reig, National Commission on Migrant Education, April 29, 1991, at 10.

[84] See S. Levitan, Programs in Aid of the Poor 100-101 (5th ed. 1985); Economic Opportunity Act of 1964, Pub. L. No. 88-452, Title IIB, 78 Stat. 508.

[85] Pub. L. No. 93-644, Title V, 88 Stat. 2291 (1974).

[86] Pub. L. No. 97-35, §§635-657, 95 Stat. 499 (1981). The Head Start Act is codified at 42 U.S.C.A. §9831-9852 (West 1983 & Supp. 1991).

Head Start is a comprehensive, locally based preschool child development program, often described as emphasizing five main components: education, nutrition, health, parent involvement, and social services.[87] Ninety percent of participants must be from families with incomes below the federal poverty guidelines, and at least ten percent of the spaces are reserved for children with disabilities.[88] Numerous studies have shown that Head Start can make a substantial difference in the lives of the children who take part, making it perhaps the most effective of all federal antipoverty programs. As a result, even in recent years of severe budget-cutting, Head Start has won firm support for expansion from both Congress and the Bush Administration. FY 1991 appropriations reached $1.95 billion, a $500 million increase over the previous year.[89] The reauthorizing legislation passed in 1990 authorizes appropriations of $4.27 billion for FY 1992, and up to $7.66 billion in FY 1994,[90] so that if appropriations keep pace (which now appears unlikely), Head Start could serve all of its target population by 1995.[91] It served some 540,000 children in 1990, approximately 20 percent of the estimated eligible population, in 31,000 classrooms operated by 1,320 grantees.[92] Most grantees are private nonprofit agencies, but some are public bodies, including public schools.[93]

Special programs for the children of migrant workers were begun in the early years of Head Start, and the 1974 legislation directed the Secretary of HEW to "continue the administrative arrangement responsible for meeting the needs of migrant and Indian children and [to] assure that appropriate funding is provided to meet such needs."[94] The same equally vague directive appears in the 1981 legislation and remains in effect today,[95] although the statute now includes a funding formula that reserves 13 percent of the total appropriation for a list of designated priorities heavily (but not exclusively) oriented toward migrant and Indian children.[96] In FY 1990, the allocation for Migrant Head Start was $60.4 million. Services were provided to 23,469 children in 33 states by the 23 Migrant Head Start grantees. (In FY 1991, $74 million was made available.[97])

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[87] See 42 U.S.C.A. §9833(a) (West 1983 & Supp. 1991); U.S. Dept. of HHS, Head Start: A Child Development Program 2-4 (1990). Under the statute and regulations, local policy councils, 51 percent of whose membership must consist of parents, exercise ultimate authority over personnel and fiscal matters. See 45 CFR Part 1304, Subpart E (1990).

[88] 45 CFR §§1305.4, 1305.5 (1990).

[89] 1990 Cong. Q. 552, 853.

[90] 42 U.S.C.A. §9834 (West Supp. 1991).

[91] 1990 Cong. Q. 552, discussing the Human Services Reauthorization Act, Pub. L. No. 101-501, 104 Stat. 1222 (1990).

[92] Fuentes testimony, supra note 78, at 3.

[93] General Accounting Office, Head Start: Information on Sponsoring Organizations and Center Facilities (GAO/HRD-89-123FS, July 1989).

[94] Pub. L. No. 93-644, §8, 88 Stat. 2291 (1974).

[95] 42 U.S.C.A. §9831(b) (West 1983 & Supp. 1991). A 1990 amendment added "nonEnglish language background" children to the list.

2. Program Operations

MHS grantees typically operate programs at numerous sites, either themselves or through delegate agencies, and some function in several states. (One grantee, East Coast Migrant Head Start, for example, operates centers through delegate agencies in 12 states.) Grantees are monitored in detail on a 3-year cycle, to measure accomplishments in light of detailed performance standards set out in the regulations and in contract documents. Head Start officials have asserted that this form of oversight, with a direct federal-to-local relationship, provides for better assurance (in comparison with the Migrant Education system) that services are provided effectively to the target population.

A typical regular Head Start center provides half-day programs throughout the school year. Because of its unique constituency, Migrant Head Start must operate in different ways and with greater flexibility. Some centers operate on a full-day basis, with two shifts, so as to provide services during the full time that the parents are working in the fields, and may have to lay greater stress on center-provided transportation, nutrition, and even laundry services. In general, regular Head Start serves children only from age three to the age of compulsory school attendance; Migrant Head Start is authorized to serve children from birth to school age (usually 0 to 5 years of age). Recently 35 percent of enrollment in MHS consisted of infants and toddlers.[98] MHS also must remain flexible to provide its services during the time when migrants are in the area; time periods and demand may change from year to year, owing to shifting weather and crop patterns. Some personnel even move from place to place during the year with the migrant population.

Demand for MHS' day-care and educational services far outstrips supply. The MHS programs we visited therefore maintain waiting lists for children from qualified families. Most operate on a first-come, first-served basis (provided that the family meets the migrancy and low income requirements).

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[96] 42 U.S.C.A. §9835(a)(2) (West 1983 & Supp. 1991).

[97] Telephone interview with Frank Fuentes, Sept. 30, 1991. An appropriation of $74 million for MHS in the FY91 budget of $1.95 billion indicates a 3.8 percent share for MHS.

[98] Fuentes testimony, supra note 78.

This arrangement gives an advantage to those families that are knowledgeable about the program and arrive early to assure sign-up. The advantages can be enormous. One MHS program we visited has a staff of 57 to provide a most impressive range of services to the 81 children it can serve. The 57 include two shifts of teachers and aides, as well as bus drivers, outreach workers, cooks, laundry staff, and supervisory personnel. (The center provides clothing for the children while in the center, washes their own clothes while they are there, and then sends them home in their own freshly laundered outfits.) Families who do not arrive in the area early enough to place their children in the Migrant Head Start program are probably relegated to day-care on a much more modest scale, sometimes day-care for which the family must pay, or must make do in some other way. This lopsided outcome should raise legitimate questions about the program's priorities; the agency might be well advised to furnish less extensive services, in order to serve more of the needy farmworker population. In any event, as this example illustrates, MHS grantees have considerable flexibility to use their funds for direct educational and child care programs, and also for transportation, clothing, health care, and a variety of other support services.

3. Definitions

The statute contains no definition of "migrant" or "farmworker"--perhaps not surprising in view of the vagueness of the statutory provisions for Migrant Head Start in general. Existing regulations likewise contain no such definitions, but regulations proposed in July 1990 essentially capture the standard that has been used as a matter of administrative practice in a new definition of "migrant family." (See Appendix B.) It is perhaps the most limited of the program definitions, covering only current migrants (with children under the age of compulsory school attendance). Although the definition does not say so explicitly, the look-back period is 12 months; the family must have moved in connection with agricultural employment within the past year.[99] Only the production and harvesting of tree and field crops count as agricultural labor, and family income must come "primarily from this activity" if the family is to qualify for MHS.[100]

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[99] MHS considers a farmworker who has enrolled in a JTPA program to have "left agriculture," so that the child's eligibility for MHS services ends 12 months after the last qualifying move. JTPA 402 grantees would generally like farmworkers who are enrolled in training programs to remain eligible for MHS services.

[100] 55 Fed. Reg. 29,970 (1990) (notice of proposed rulemaking) (proposed 45 CFR §1305.2(l)).

There has been some discussion among MHS directors about expanding the program to reach seasonal agricultural workers, and MHS recently chartered a limited pilot program for this wider constituency. But as long as funding remains limited, we found stronger support within MHS than elsewhere for retaining a relatively narrow definition focused on current migrants.[101] Some hold to this view even if definitions are harmonized across agencies, again as a way of targeting limited resources in a time of budgetary stringency. But some who advocated this view were also willing to countenance expansion to, e.g., a 24-month look-back period, because of the difficulties a family may face in its first year of settling out of the migrant stream.[102]

MHS performance standards require grantees and delegate agencies to coordinate with other available services at the local level.[103] As indicated above, cooperation is particularly in evidence with Migrant Health (and other health agencies), in light of the specific obligation of MHS to provide health screening and certain health services to its children.[104]

D. Job Training for Migrant and Seasonal Farmworkers (JTPA 402)

1. Background and Statutory Framework

Like Migrant Head Start, job training programs for migrant and seasonal farmworkers originated in the Office of Economic Opportunity, under the very general language of Title IIIB of the Economic Opportunity Act of 1964.[105] In July 1973, however, responsibilities for MSFW job training and placement were transferred to the Department of Labor under a presidential order (supplemented by a Memorandum of Understanding between OEO and DOL), as part of the Nixon administration's efforts to phase out OEO.[106] Less than 6 months later, Congress completed work on long-debated umbrella legislation for federal job training and employment programs, the Comprehensive Employment and Training Act (CETA).[107] Section 303 of CETA, which became the framework for DOL efforts to assist MSFWs from 1974 through 1982, provided specific statutory authority for the ongoing programs to meet the training needs of migrant and seasonal farmworkers.

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[101] Interview with Thomas Hill, MHS director, Fresno, California, July 16, 1991; interview with Geraldine O'Brien, supra.

[102] Interview with Geraldine O'Brien, Executive Director, East Coast Migrant Head Start Project, Oct. 22, 1991.

[103] 42 U.S.C.A. §9837(c) (West 1983 & Supp. 19991) recently added a provision requiring all Head Start agencies to coordinate with local schools and other programs serving the relevant children and families.

[104] Through its National Migrant Headstart Directors' Association (NMHDA), an umbrella organization, MHS grantees have also cooperated in broader initiatives to improve interagency coordination. See part V.A.3. infra.

[105] See Great Society, supra note 12, at 247-61; Klores, supra note 7, at 15-46. As amended in 1968, the statute described the program's purpose as follows: "to assist migrant and seasonal farm workers and their families to improve their living conditions and develop skills necessary for a productive and self-sufficient life in an increasingly complex and technological society." 42 U.S.C. §2861-2 (1970).

CETA drew increasing criticism through the 1970s, primarily because of the operation of its nonmigrant programs. Critics focused on CETA's extensive reliance on subsidized public-sector jobs, while at the same time audits disclosed high administrative costs and other operating problems. CETA thus became a prime target for the incoming Reagan administration, and the Act was allowed to expire in 1982. In its place Congress enacted a new framework for federal job training programs, the Job Training Partnership Act (JTPA).[108]

As the title suggests, in its primary programs, the JTPA establishes a partnership between the private and public sectors covering all aspects of local policymaking and administration, including deciding locally what types and combinations of services to provide.[109] The general provisions of JTPA (separate from the farmworker provisions) give state governors several functions formerly assumed by DOL. In particular, the governors have a larger role in coordinating job training programs, and they designate local service delivery areas, the units of government within which the job training programs are to operate. Local programs function under the guidance of local governments and Private Industry Councils (PICs), composed primarily of business representatives, but including members from labor, educational, and community groups. Most trainees are to be drawn from the ranks of the economically disadvantaged. Local programs must satisfy demanding performance standards, emphasizing successful job placements in unsubsidized employment. In addition, the Act places strict limits on the percentage of the funding that grantees may spend for administration.[110]

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[106] See Klores, supra note 7, at 45-46; Ass'n of Farmworker Opportunity Programs, Toward an Equitable CETA 303 Allocation Formula for Farmworkers 4-5 (1978) [hereafter cited as AFOP].

[107] Pub. L. No. 93-203, 87 Stat. 839 (1973).

[108] Pub. L. No. 97-300, 96 Stat. 1369 (1982).

[109] See General Accounting Office, The Job Training Partnership Act: An Analysis of Support Cost Limits and Participant Characteristics 2 (GAO/HRD-86-16, Nov. 6, 1985).

[110] See New Job Training Program Replaces CETA, 1982 Cong.Q. Almanac 39.

Despite persistent efforts from some quarters to bring MSFW programs under this decentralized JTPA umbrella, Congress chose to retain a special national program for farmworkers, much like CETA 303, under §402 of the JTPA.[111] Overseen by the Office of Special Targeted Programs in DOL,[112] rather than by PICs or state governors, JTPA 402 is not subject to the same partnership approach that characterizes general JTPA programs. Section 402 begins with a congressional finding that:

> chronic seasonal unemployment and underemployment in the agricultural industry, aggravated by continual advancements in technology and mechanization resulting in displacement, constitute a substantial portion of the Nation's rural unemployment problem and substantially affect the national economy.[113]

The statute then authorizes services through public agencies and private nonprofit organizations that can administer "diversified employability development program[s]" for MSFWs.[114] Section 402 reserves an amount equal to 3.2 percent of the funding for Title IIA of the JTPA (the major general job training component) for MSFW projects, but Congress in recent years has appropriated funds above this level.[115] In addition, JTPA grantees have received funds as the conduit for other short-term federal assistance, such as money from the Federal Emergency Management Agency in response to a nationwide drought in 1988 and a California freeze in 1990-91. Congress appropriated $70.3 million for JTPA 402 in FY 1991, out of a total of $4.09 billion for all of JTPA.[116]

2. Program Administration and Operation

Following a procedure developed under CETA, but since refined, the distribution of JTPA 402 funds incorporates two steps. First, funds are allocated among the states based on population estimates of the number of farmworkers in each.[117] Then a competitive process is used to decide on the grantee who will provide the JTPA 402 services in that state. DOL prefers to deal with a single grantee in each state, but California, with the largest number of farmworkers, currently has five grantees.

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[111] 29 U.S.C. §1672 (1988). The controversies over whether to retain a distinct, nationally-administered MSFW program or to incorporate it into the general, and decentralized, job training activities, recapitulated battles that have raged since OEO days. See, e.g., Klores, supra note 7, at 24-25, 48-66. Congress has generally supported national administration. Section 402(a)(2) now provides: "because of the special nature of farmworker employment and training problems, such programs shall be centrally administered at the national level."

[112] This Office also has responsibility for a few other national employment programs, such as those for Native Americans and older workers.

[113] 29 U.S.C. §1672(a)(1).

[114] Id., §1672(c)(1).

[115] Department of Labor, The Farmworker Program (mimeo, Sept. 25, 1991).

[116] AFOP Washington Newsline, July/Aug. 1991, at 3.

The state-by-state allocations have been the subject of controversy for many years.[118] Current allocations are based upon the 1980 decennial Census of Population (COP), which shows the number of persons working in agriculture as of the last week in March. These COP data were adjusted in the late 1980s using Immigration and Naturalization Service data to account for legalized farmworkers under the special amnesties enacted in 1986 for certain undocumented aliens.[119] The use of COP data to distribute MSFW funds has been criticized, primarily because the census identifies mostly farmworkers who were employed in March. Farmwork is then at a low ebb; consequently this procedure underestimates the number of farmworkers by at least two-thirds,[120] and it probably distorts the count in favor of home-base states over those where migrants may do most of their work during the growing and harvesting season.

Difficulties with decennial census figures reflect a larger problem with farmworker population data, as we will discuss below. Nevertheless, JTPA 402 grantees expect that COP data are likely to remain as the basis for their allocations. They have been working for years, so far unsuccessfully, to urge modest modifications in the COP questionnaires to better identify persons who have worked in agriculture. In particular, they have advocated a change in the census long-form questionnaire to ask that sample of respondents to distinguish between farm and nonfarm wages earned during the previous year.[121]

The regulations allow DOL to exclude states with small MSFW populations from Section 402 allocations if their total grant would be less than $120,000; for this reason, Alaska, Rhode Island, and the District of Columbia have no JTPA 402 program.[122] Other states qualify but are not guaranteed funding; potential grantees must compete on a biennial basis to be awarded the allocated funding to serve the state at issue. But in fact all the rest of the states are currently served, by a total of 29 nonprofit organizations, one local agency (Kern County, California), three state agencies (Florida, Utah, and Wisconsin), and the Commonwealth of Puerto Rico.[123] As the arithmetic indicates, some nonprofit grantee organizations have successfully competed to become the responsible agency for several states at once. Telamon Corporation, for example, serves nine states in the Midwest and East Coast regions.

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[117] 29 CFR §633.105 (1990). Under this regulation, DOL first reserves 6 percent of the §402 monies for a national account, usable for technical assistance and special discretionary projects. The balance, 94 percent, is then distributed among the states.

[118] See generally AFOP, supra note 104 (critiquing CETA allocation formula); California Human Development Corp. v. Brock, 762 F.2d 1044 (D.C.Cir. 1985) (court rejects extensive challenge to allocation formula).

[119] See The Farmworker Program, supra note 113, at 1; 55 Fed.Reg. 7,607 (1990).

[120] Leslie Whitener, Hired Farm Labor Data from the Decennial Census: Limitations and Considerations (Mimeo, August 1983.)

[121] See Testimony of Lynda Diane Mull, Association of Farmworker Opportunity Programs, before the National Commission on Migrant Education, Buffalo, April 29, 1991, at 4-5.

JTPA 402 is a highly flexible program. Most of its funding goes for the training of those MSFWs who are seeking a major occupational change, and most such persons are seeking to leave agriculture for a more stable job in the nonfarm economy. Obviously persons who have settled out of the migrant stream, or are in the process of doing so, are the most likely to enroll in such programs, rather than current migrants. This result is not out of keeping with the program's purpose; JTPA 402, like its predecessors, specifically includes seasonals among those eligible for its services.

The services that may be provided to such MSFWs in connection with their retraining are extensive, and may include recruitment, assessment, classroom instruction, on-the-job training, job placement, follow-up and counseling, and other forms of support.[124] The regulations require that at least 50 percent of a grantee's funds be spent on training. In addition, a wide range of expenses may be charged to "training-related support services," when provided to someone enrolled in this component of JTPA 402--for example, child care, health services, financial counseling, and a stipend equal to an hourly wage to the individual during the time of the training.[125] A grantee may spend several thousand dollars on a participant who makes use of this most extensive version of JTPA 402 services.[126]

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[122] The Farmworker Program, supra note 113, at 1.

[123] Id.

[124] Interview with Diana Carrillo, Center for Employment Training, Salinas, California, July 15, 1991.

[125] See 29 CFR §633.304(c)(3) (1990).

[126] The DOL reports that over the nine years of the JTPA 402 program, 97,000 farmworkers have been placed into permanent unsubsidized employment, at a unit cost of $3700. The Farmworker Program, supra note 113, at 2. It also reports a grand total of some 391,000 participants in employment and training activities generally, at an average expenditure of $1200 per participant. Id.

But JTPA 402 is also designed to enhance the skills of those who choose to remain in agriculture,[127] and the most flexible component of the 402 program is directed to this end. The regulations stipulate that these "nontraining-related supportive services," provided to persons who are not enrolled in the more extensive training, work experience, or tryout employment programs, may include (but are not limited to) "transportation, health care, temporary shelter, meals and other nutritional assistance, legal or paralegal assistance and emergency assistance."[128] Grantees may not, however, use more than 15 percent of their grants for these supportive services. In 1990, 26,500 MSFWs received these supportive services, out of a total of 53,000 people served by JTPA 402 grantees.[129]

This element of JTPA programs is significant for interagency coordination.[130] Other service programs may turn to the latter when services that fall outside their own mandates are needed. For example, Migrant Health may turn to JTPA for help in transporting an injured individual back to the home-base state after initial treatment at a clinic. But because eligibility for JTPA services is governed by a technical and restrictive definition of MSFW (discussed below), these requests occasionally cannot be honored, leaving the other service organization frustrated and probably impatient with definitional restrictions. Although such episodes are not terribly frequent and their impact should not be exaggerated, they accounted for the most common example cited to us during interviews of the ways in which definitions impose barriers to coordination.[131]

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[127] Early versions of MSFW job training programs focused heavily on training for and placement in nonagricultural employment. This emphasis grew logically from the then-prevalent assumption that migrant farmwork was disappearing, increasingly displaced by mechanized harvesting. But it provoked the opposition of agricultural interests, who felt that these programs amounted to a federal effort to lure away a necessary workforce. Eventually this criticism was mollified by added statutory and regulatory language making clear that the job training programs exist not only to train for nonagricultural employment, but also for enhanced employment within agriculture itself. See D. Pederson & D. Dahl, Agricultural Employment Law and Policy 136 (1981). For the current language to this effect, see 29 U.S.C. §1672(c)(3) (1988).

[128] 29 CFR §633.304(c)(4).

[129] The Farmworker Program, supra note 113, at 2.

[130] Through their principal umbrella organization, the Association of Farmworker Opportunity Programs (AFOP), JTPA 402 grantees have also paid considerable attention to interagency coordination issues. AFOP publishes a thorough and useful monthly newsletter, the AFOP Washington Newsline, and also a number of position papers and other studies.

[131] This frustration was probably magnified in the early 1980s, as job training programs shifted from CETA to JTPA. As indicated, JTPA imposed a 15 percent cap on these ancillary services; CETA had no equivalent limit. "With a regulatory limitation established on the amount of supportive services that could be provided by §402 programs, other agencies began to feel the burden of increased referrals because the programs could no longer support the cost of health,

3. Definitions and Eligibility

Though §402 of the statute specifies "services to meet the employment and training needs of migrant and seasonal farmworkers," it contains no definition of these key terms. Since 1974, definitions have been provided in the DOL regulations, frequently adjusted and refined as experience was gained. The 1974 version defined "farmworker" by reference to standard occupational classifications (SOC) provided in DOL's Dictionary of Occupational Titles.[132] This approach proved problematic, and in 1975 new regulations were issued, employing standard industrial classification (SIC) codes. These proved more workable, and all later regulations have maintained this basic framework. (For the current definitional provisions, see Appendix B).[133] Those who work for wages in the agricultural production or in specified agricultural services are farmworkers. Both crops and livestock are included, as is the on-farm packing of agricultural commodities.

Throughout the history of the regulations, migrant farmworkers have been a subset of seasonal farmworkers: migrants are those seasonals who are unable to return to their permanent places of residence within the same day. Thus, definitional refinements have focused on the criteria for "seasonal farmworker." The first such definition appeared in 1974, but was changed in 1975 "to assure consistency in the definitions used by different units of the Manpower Administration" of DOL.[134] At that time, the definition considered the person's employment only during the preceding 12 months, and individuals had to have worked at least 25 days in farmwork but no more than 150 days in one establishment to qualify as a seasonal farmworker.[135] Grantees criticized this definition as overly cumbersome,[136] and then worked with DOL to produce a better one.

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child care, transportation, and other emergency services at previous levels. The other major farmworker service providers were not expecting that such drastic changes would occur, nor were they expecting that their programs would now be required to pick up the pieces." Mull testimony, supra note 119, at 6.

[132] 39 Fed.Reg. 28,401 (1974).

[133] 40 Fed.Reg. 28,983 (1975). The current version, using virtually the same SIC codes, appears at 29 CFR §633.104 (1990).

[134] 40 Fed.Reg. 28,980 (1975). Some of the key elements, including the 25-day minimum and 150-day maximum, track the definitions used for the ES-223 data reports elsewhere in DOL, as explained in Part IV infra. Persons interviewed noted this parallel, but did not believe that it had any real operative significance. In any event, later changes in the definitions for the job training programs have ended this commonality.

[135] Id. at 28,983.

[136] See, e.g., AFOP, supra note 104, at 66.

In 1979 another set of regulations was introduced, dropping the 150 day limit and replacing it with a simpler requirement that farmworkers must not have a constant year-round salary if they are to qualify as seasonals. In addition, the look-back period was expanded to 24 months and an alternative to the 25-day minimum was provided. A farmworker would either have to work 25 days or earn at least $400 in farmwork to qualify; this was seen as a "more realistic" criterion for the legislation's target population, and one that would be administratively feasible.[137] These specifications (but with a different look-back provision) survive in the current regulations.

In the rules proposed to implement JTPA §402, after it replaced CETA §303, DOL attempted to return to the 12-month look-back period.[138] This proposal drew considerable criticism, and DOL retreated to the complicated look-back compromise that appears in today's regulations.[139] In determining eligibility, grantees now must assure that the individual met the minimum farmwork requirements during any period of 12 consecutive months during the past 24 months. They must also find that the individual was "primarily" employed in farmwork.[140]

This is complicated enough. But the regulations also introduce other limitations, not as part of the definition, but as part of the eligibility requirements.[141] For example, during the eligibility determination period, the farmworker must have earned at least 50 percent of total earnings or been employed at least 50 percent of total work time in farmwork. (Why this was thought a necessary limitation, when the definition already requires that a seasonal farmworker be "primarily" employed in farmwork, is unexplained.) Further, and more understandably, a means test is imposed. The farmworker must be part of a family either receiving public assistance or having an annual family income that does not exceed the higher of the poverty level or 70 percent of the Bureau of Labor Statistics' "lower living standard income level."[142] Dependents of farmworkers who meet these stipulations are also eligible for the services of JTPA 402.

Finally, the regulations refer to general statutory limitations imposed by the JTPA on all recipients of services. These require that all males must register with the Selective Service, and that all participants must be citizens, permanent resident aliens, or other aliens authorized to work in the United

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[137] 44 Fed.Reg. 30,594 (1979).

[138] 48 Fed. Reg. 33,182 (1983).

[139] See 48 Fed.Reg. 48,774 (1983).

[140] 29 CFR §633.104 (1990).

[141] 29 CFR §633.107(a) (1990).

[142] The latest revision of the lower living standard income levels, provided solely for JTPA eligibility purposes, appears at 56 Fed. Reg. 24,097 (1991).

States.[143] These limitations sometimes prove frustrating for service providers in other programs trying to coordinate with JTPA 402, for their statutes do not impose similar limits, especially regarding legal immigration status. Moreover, some service providers, particularly those dealing with education,[144] feel strongly that they should do nothing to discourage undocumented alien farmworkers or their families from taking advantage of their services. Nevertheless, JTPA grantees and DOL have no discretion in the matter, for these restrictions are express statutory requirements. Moreover, as several JTPA officials or service providers acknowledged, one cannot realistically expect a change, particularly in the requirement for work authorization, given that JTPA 402 is a training program designed to prepare workers for better jobs in the U.S. labor market.

4. Current Issues

During our interviews we heard some criticism of the JTPA 402 program, both from other service providers and from those involved in the program. Criticisms concerning coordination are mentioned above, as is the problem of using decennial census data to establish initial state allocations. We also learned that the strict performance standards employed by JTPA, with their emphasis on documented and successful job placements, can lead to "creaming." That is, grantees are induced to select for the training components of their programs only those already possessing the aptitude, talent or drive that might make them successful even without assistance, to the possible neglect of persons equally deserving but less likely to succeed. The same criticism is frequently directed to the general JTPA job training programs funded under the statute and run by PICs in the states and localities. Remedies are not obvious without relaxing some of the key accountability components on which Congress has insisted.[145]

Some persons we interviewed also commented that geographic targeting of services could be improved. Despite the apparent targeting provided by the two-step allocation process, many acknowledged that this only serves to provide a gross state-by-state population count. It does not necessarily assure that the state grantee will locate service centers in areas of heavy MSFW concentration nor keep up with changes in MSFW activity. Biennial grant reviews do monitor the effectiveness of services, and the federal contract officers may well pick a different grantee if the numbers provided by the first fall off. But if the grantee is serving well a significant number of persons at its current locations, Washington officials are not equipped to help identify other parts of the state that may not be well-served. One commented: "What do we know here about what's going on in the states?" More sensitive measures of MSFW activities and populations would be needed to improve performance in this area.

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[143] Id. §633.107(c), referring to sections 167(a)(5) and 504 of the JTPA, 29 U.S.C. §§1577(a)(5), 1504 (1988).

[144] See generally Plyler v. Doe, 457 U.S. 202 (1982) (Constitution forbids certain state restrictions on education for undocumented alien children).

[145] See, e.g., Victor, *Helping the Haves*, 1990 NAT'L J. 898 (1990); Guskind, Cheers and Bronx Cheers for Jobs Law, 1988 NAT'L J. 2407.

Finally, some comments focused on the vigor or competitiveness of JTPA grantees. As indicated, most are private nonprofit organizations. Interviews indicated that they tended to be among the most entrepreneurial or aggressive of the grantee community. For example, several JTPA 402 grantees are also Migrant Head Start grantees, and a few also manage Migrant Health clinics. Many also pursue other private and public sources of funding, such as FEMA disaster assistance funds or community service block grant awards, and even AIDS education programs. Their success in these endeavors sometimes crowds out other applicants and can therefore generate resentment. This may simply be an inevitable byproduct of the quasi-entrepreneurial competitive system used for choosing the providers of most of the MSFW services. In any event, this enterprising approach may reflect the rather different nature of the task shouldered by JTPA 402, compared with those of other MSFW service programs. Although one should not overgeneralize, a JTPA grantee may have more need to engage in affirmative outreach and persistent recruitment to enroll participants and thus meet its performance standards. Migrant Education has a natural location to find its target population, for migrant children are required to enroll in school. Migrant Health is an obvious destination when farmworkers and family members become sick. Child care is also an obvious need when there are young children in the family, and Migrant Head Start easily becomes known as a provider. By comparison, JTPA's services are more remote and of uncertain application; MSFWs must often be persuaded to avail themselves of training opportunities.

E. Other Federal Programs Serving Farmworkers

The programs described so far (the "Big Four") meet certain important needs of farmworker families--primarily medical care, education (including job training), and child care. But often comprehensive assistance to such a family will obviously have to attend to other basic needs as well, such as food, housing, or legal assistance. Federal programs exist in each of these fields. Some specifically target the needs of MSFWs, but most of them are more general efforts to assist the disadvantaged. In the latter programs, farmworkers who qualify can also take part, and on occasion such a program will adjust certain of its requirements or practices to take account of special requirements of migrants.

For example, nutrition assistance can be obtained through Food Stamps or the Supplemental Food Program for Women, Infants, and Children (WIC). The Food Stamp program, which dates to 1964 (and earlier pilot programs), is designed to increase the food purchasing power of persons with incomes below the poverty level and of those who are receiving certain forms of public assistance. Complicated formulas determine the amount of food stamps to which a household is entitled, and the stamps may be used to purchase any food for human consumption (alcohol, tobacco and imported foods are excluded). The program is overseen by the Department of Agriculture (USDA), but it is administered by state welfare or social services agencies.[146] In FY 1991 the program provided total benefits to recipients in the amount of $17.4 billion.[147] There is no special set-aside of funding for MSFWs, but in a realistic acknowledgement of the effect that uneven work patterns can have on farmworker families, the regulations make special provision for "expedited service" (ordinarily meaning receipt of food stamps within 5 days) to MSFW households in specified circumstances.[148]

The WIC program was adopted in 1972, primarily to address the issue of low birthweight babies. Administered by the Food and Nutrition Service of USDA, the program is implemented through state health departments. It now provides supplemental foods for a specified time period to pregnant, postpartum, or breast-feeding women and to children under age 5, as well as nutrition education and certain health-related services. Recipients must meet income guidelines or else qualify for "adjunct eligibility" through receipt of food stamps, Medicaid, or Aid to Families with Dependent Children (AFDC), and they must be determined to be at "nutritional risk."[149] Recently Congress has insisted that the State plans under which WIC is provided must specially describe how they will address the needs of "migrants, homeless individuals, and Indians," and the Secretary is to report biennially on efforts to assure migrant participation despite their interstate movement.[150] The implementing regulations provide for a "migrant set-aside" of 0.9 percent of the fiscal year food appropriation for migrants, a total of $16.2 million in FY 1991.[151] WIC has also pioneered the use of a "verification of certification" card that is issued to migrant recipients to ensure continuity of benefits as the family moves from area to area. Those who have the card need not go through the whole process of application and eligibility determination in the new location. Service providers in other programs have expressed interest in adapting this model for other services, particularly with regard to Medicaid.

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[146] See generally Levitan, supra note 82, at 77-81; Super, *Introduction to the Food Stamp Program*, 23 CLEARINGHOUSE REV. 870 (1989). The Food Stamp Act is codified at 7 U.S.C. §§2011 et seq., and the implementing regulations appear at 7 CFR Parts 271-282.

[147] Telephone interview with Daniel Woodhead, USDA Food and Nutrition Service, April 15, 1992.

[148] See 7 CFR §§273.2(i)(1); 273.10(e)(3) (1991).

[149] See generally Introduction to the WIC and CSFP Programs, 24 Clearinghouse Rev. 820 (1990). The authorizing legislation is codified at 42 U.S.C. §1786 (Supp. 1989), and the implementing regulations appear at 7 CFR Part 246 (1991).

Housing needs are often acute for MSFWs. Over the past two decades, many employers have discontinued the provision of housing, in part because of greater success of enforcement of housing codes and other protective provisions administered by the Department of Labor.[152] Substandard housing remains a major problem, and the need for improved enforcement continues. The federal government also provides funds to support the construction or rehabilitation of farmworker housing, through programs administered by the Department of Agriculture. Under §514 of the Housing Act of 1949, USDA provides loans on highly favorable terms to farmers, farmers' associations, states, and private nonprofit agencies to construct or rehabilitate housing for farm labor.[153] Section 516 of the Act authorizes grants to nonprofit agencies to cover up to 90 percent of the cost of housing for the same basic purposes.[154] Funding for these purposes declined from $68.7 million in 1979 to $22.0 million in 1990, before rebounding to an appropriation of $27.3 million in FY 1992.[155]

The federal government provides civil legal services to persons who meet certain income and other criteria through a governmentally chartered private nonprofit body, the Legal Services Corporation (LSC), established in 1974.[156]

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[150] 42 U.S.C. §1786(f)(1)(C)(4), (j).

[151] Telephone interview with J.B. Passino, Food and Nutrition Service, USDA, April 16, 1992. See 7 CFR §246.16(c)(2)(i)(B) (1991). The regulations define "migrant farmworker" as "an individual whose principal employment is in agriculture on a seasonal basis, who has been so employed within the last 24 months, and who establishes, for the purposes of such employment, a temporary abode. Id. §246.2.

[152] See General Accounting Office, Hired Farmworkers: Health and Well-Being at Risk 28 (GAO/HRD-92-46, Feb. 1992).

[153] 42 U.S.C. §1484 (1988).

[154] 42 U.S.C. §1486 (1988). The implementing regulations for both the loan and grant programs may be found at 7 CFR Part 1944, Subpart D.

[155] GAO, Hired Farmworkers, supra note 150, at 29; Telephone interview with Tom Sanders, Multi-Family Housing Division, USDA, April 16, 1992.

[156] 42 U.S.C. §2996 et seq. (1988).

A 1977 study, requested by Congress, established a special need for legal assistance to migrant farmworkers, particularly in view of their usual remoteness from population centers, language difficulties, and frequent travel.[157] As a result, LSC undertook special efforts to create programs to meet these needs. In the mid-1980s, however, when this initiative appeared threatened, Congress provided a special line-item appropriation to assure continuation of migrant legal services. Migrant legal services programs now exist in 46 states, under an appropriation for FY 1992 of $10.8 million. Assistance using this federal funding may be provided only to farmworkers with legal immigration status.[158]

None of these programs is able to serve what it considers its entire target population, and in any event each has limited capacity to assist those who are not physically located close to one of the program's facilities. When this is the case, the farmworker family must either do without the service, acquire it using family resources, or rely on state, local, or private funding to assist. At the state and local level there is enormous variety in the assistance of the latter types.[159]

III. Coordination at the State and Local Level

A. Existing Coordination

1. State Level

Most of the MSFW service providers and officials we interviewed felt that local and state level coordination in their areas had improved in recent years, but nearly all agreed that more could be done. Much of this improvement has stemmed from statewide task forces or councils on migrant farmworkers, usually established under the authority of the state governor. Typically these bodies bring together a wide range of interests, ranging from growers' representatives through officials of service and enforcement programs (both MSFW-specific and more general programs) to Legal Services and farmworker advocacy groups. In Virginia, for example, after a somewhat acrimonious start many years ago, the Governor's Board on Migrant and Seasonal Farmworkers moved beyond adversarial relationships to focus on cooperative initiatives, such as the construction of improved housing for migrants.[160] In Illinois, the statewide Inter-Agency Committee on Migrant Affairs meets six to eight times a year to set priorities, share analyses of farmwork trends, identify gaps in services, and undertake similar functions. Local networks are also encouraged to get together regularly during the farmwork season.[161] In Indiana, a Task Force on Migrant Affairs has existed since 1952; it meets monthly and has numerous standing committees to examine specialized issues. One of these committees spearheaded the creation of an impressive Consolidated Outreach Project to enroll migrants and their children. This program merits a fuller description, as it could serve as a model for similar efforts elsewhere (indeed, local providers elsewhere have already drawn inspiration from the Indiana experience).

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[157] See General Accounting Office, Legal Services Corporation: Grantee Attorneys' Handling of Migrant Farmworker Disputes with Growers 2 (GAO/HRD-90-144, Sept. 1990).

[158] See 45 CFR §1626.4 (1991).

[159] The above listing does not exhaust the range of federal assistance programs that might possibly be called upon in meeting the comprehensive needs of a farmworker family. See generally Table 1, supra, and Directory, supra note 48. In addition to assistance programs, the federal government has established several enforcement regimes that can be brought to bear to improve the situation of MSFWs. The most important are the Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. §1800 et seq., the Fair Labor Standards Act, 29 U.S.C. §201 et seq., and the Occupational Safety and Health Act, 29 U.S.C. §651 et seq., all three administered by the Department of Labor, and the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §136 et seq., administered by the Environmental Protection Agency.

a. Indiana

In the early 1980s, many MSFW programs faced declining budgets. Seeking ways to do more with less, the Program Operations Committee of the Indiana Task Force proposed pooling agency funds used for intake processing and for outreach (e.g., to locate new concentrations of MSFWs or facilitate their access to services). Although the different service programs used varying definitions and eligibility criteria, it proved possible to develop a single-page form that would capture the main information needed by each of them. Four agencies initially agreed to fund the effort. The Indiana Department of Human Services won the initial contract to provide these outreach services, but recently this function was shifted to Indiana Health Centers, Inc., a private nonprofit organization that is also the Migrant Health grantee for the state. That organization now has 23 caseworkers on its staff performing this outreach function throughout the state.

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[160] Interviews with Nancy Quynn, Peninsula Legal Services, Eastern Shore of Va., July 31, 1991; Kevin Boyd, Telamon Corporation, Richmond, Va., July 31, 1991.

[161] National Migrant Resource Program, Inc., Integration and Coordination of Migrant Health Centers, at III-25 (report submitted to HHS, Feb. 28, 1992).

The consolidated outreach form has been refined over the years; the latest version appears in Appendix C. The caseworker goes over each item carefully with the farmworker being interviewed (usually at his or her residence in the migrant camp) and fills in the form. Then both caseworker and interviewee sign it. One copy of the form is used to enter the data in a central computer system, which keeps a complete individual record and also generates limited monthly census data usable for funding purposes. Other copies go to various programs or caseworkers, and one copy is kept by the farmworker family. The Project uses financial incentives to encourage clients to keep the form and make use of it as they obtain services from MSFW programs. For example, certain discounts on Migrant Health services are available for those who present their own yellow copy at the clinic, and this copy also gains them preferred access to a migrant food pantry.

The consolidated outreach process has not fully achieved its original objectives; it does not entirely replace individual intake processing by the separate programs. The originators of the program eventually came to appreciate the additional functions, in addition to form completion, that the intake staff of the various programs performs; hence some intake staff for each of the specific programs had to be retained. For example, these staff members also carry out certain preliminary needs assessments or furnish counseling. Nevertheless, we were told that the consolidated outreach form saves an average of 45 minutes per case for the intake staff of specific programs--a worthwhile economy. And consolidation also reduces considerably the burden on the MSFW family seeking to use several of the available services.[162]

b. Iowa

Iowa has achieved an important measure of consolidation of services through a different process. Proteus, Inc., had been the JTPA 402 grantee for the state for several years when in 1990 it also successfully competed to become the state grantee under the Migrant Health and Migrant Head Start programs. The management team thereupon decided to use a single intake staff for the basic intake and outreach process of the three programs. But they soon encountered a problem. Under the statute, JTPA processing requires detailed information about the immigration or citizenship status of an enrollee, whereas MHS and MH have insisted on agnosticism about such issues, in order better to fulfill their underlying missions. Eventually Proteus decided to have phased questioning, and to train its staff to begin all intake sessions with a brief orientation program, during which prospective enrollees are counseled that if they desire only medical or Head Start services, they will not have to answer questions about status. (Those not seeking JTPA services also are subject to less rigorous documentation requirements; they need not necessarily show W-2 forms to document work history.)[163]

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[162] The information in this section is drawn from an interview with Lynn Clothier, Indiana Health Centers, Inc., Indianapolis, Aug. 16, 1991, and from descriptive literature of the Consolidated Outreach Project.

The Proteus intake form, a one-page sheet (reproduced in Appendix C), allows for the gathering of a considerable amount of background information, including work history, that can be used in determining eligibility for a number of programs, and also to help determine specific needs within the programs. In fact, Proteus also uses this form as the basis for preparing certificates of eligibility for the state Migrant Education program, a task it carries out under contract with the state ME office.[164]

Further consolidation or integration of actual services has been hampered, however, in part because the parent programs insist on keeping their own component of Proteus's services separately identifiable, somewhat like a stand-alone program. Also, the great variety in the performance standards of the programs also inhibits full comprehensive planning. To take the example of child care, Proteus strives to avoid turning anyone away who seeks such services. Nevertheless its MHS program (which operates during the peak farmwork months of July and August) has a fixed enrollment limit. When needed, additional child care is provided, on a modest scale, using nontraining support services funds from JTPA. MHS in particular is said to be hard to administer because of its elaborate requirements for plans and reports, and its demanding performance standards (e.g., full physical and dental screening is required, even if the child recently received such screening at the last place of residence). Some greater comparability among the programs in this respect would promote greater integration of services.

c. Illinois

In Illinois, the JTPA 402 grantee, the Illinois Migrant Council (IMC), also became the Migrant Health grantee. In addition to the opportunities for consolidation and coordination this arrangement afforded, further coordination has succeeded with a number of other state and private bodies that serve farmworkers. According to a recent thorough case study of the program, IMC has developed cooperative working relationships with county health departments, the Department of Rehabilitative Services, Department of Public

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[163] Interview with Terry Meek, Executive Director, Proteus Employment Opportunities, Inc., February 28, 1992.

[164] Id. Proteus also does some outreach to farmworkers in connection with the Wagner-Peyser Act, 29 U.S.C. §§49-49k (1988).

Aid, Migrant Education and Migrant Head Start, the state health department, the American Medical Students Association, the Rural Community Assistance Program, and the statewide Inter-Agency Committee on Migrant Affairs.[165] Particularly impressive have been the formal agreements negotiated with ME and MHS, which permit highly integrated medical services to migrant children. Physical exams of school age children, for example, are performed by IMC, with ME paying approximately 50 percent of the cost. Dental services are also provided by IMC, at a fixed rate of $20 per child for MHS participants and under a flat-fee arrangement with ME for $15,000 to serve approximately 1,200 school-age children.[166] This combined effort has also facilitated a comprehensive strategy to deal with dental problems among MSFWs. Arrangements have been made for sharing of records throughout the season, and a season-end "record swap" to assure complete documentation on all children.[167]

d. New York

The Cornell Migrant Program based near Rochester, New York, spearheaded the development of a Working Together Group involving eight MSFW service programs in Western New York. It included the Big Four programs as well as legal services, a literacy program, and a social ministry. The Group was formed under the guidance of an outside facilitator in 1988 to reduce conflicts among agencies that serve MSFWs, which had been particularly apparent in the planning for a conference that year to address racism. In 1989 the agencies successfully cooperated to stage a farmworker festival for 500 workers. Later they worked to develop a coordinated outreach effort involving a joint intake form and joint training for outreach staff. The MSFW agencies then cooperated to win a grant to deal with substance abuse among farmworkers and another to coordinate literacy services. The guiding principle of the Group appears to be coordination to obtain additional resources for joint activities, usually in areas that fall outside the reach of the specific mission of each program, rather than endeavors that might ultimately lead to transfer of funding from one agency to another as preexisting tasks are consolidated.

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[165] NMRP, supra note 159, at III-21 - III-36. The study also contains illuminating case studies of eight other programs and offers useful conclusions and recommendations on coordination and integration of services to MSFWs.

[166] Id. at III-24.

[167] Id. at III-25.

2. Local Level

Often statewide task forces or councils mandate or encourage the creation of similar local service providers' councils. There are several in Virginia, for example; the council on the Eastern Shore, where MSFW activity is concentrated, meets monthly and is working on developing a consolidated outreach approach. In the meantime it has arranged for "service fairs," to make it easier for migrant families to learn about and register for those programs in which they might be interested. Under these arrangements, instead of descending on the camps piecemeal after the migrant work season begins, all the major service providers (up to seven participate) go to a camp on the same evening to do outreach and intake processing. Local councils also provide a forum for discussing common issues and sharing information about program or about changes in the population or farmwork patterns.

B. Functions and Obstacles

The primary function of existing coordination forums is information sharing. They may also facilitate the process whereby the various programs refer a client to another program--a sick child from ME to a migrant health clinic, for example. Coordination runs into problems, however, when the agencies must deal with issues that may have resource implications.[168] In the type of example given, the local or state ME and MH agencies may wind up arguing over who bears responsibility for paying for the health services that are provided to the schoolchildren. Similarly, coordinated outreach proposals have also run aground on these sorts of financial issues, when the agencies cannot agree on a formula to pay for the cost of the single primary outreach staff.

Sometimes resource conflicts become so acrimonious that they may inhibit recognition of productive coordination--giving rise to a misleading sense that less ambitious coordination efforts (such as those that do not seek any resource transfers among programs) are more successful because they give rise to fewer complaints. For example, a recent national meeting of the major MSFW service providers awarded special recognition to the Working Together Group from New York, selecting it over the Indiana Coordinated Outreach Program. The New York program, relying on a Cornell University-funded staffer to serve as a neutral convener to help work out common problems and to avoid competition for funds, generated less opposition than the Indiana program. The nomination of the Indiana program, in particular, was resisted by the former JTPA 402 grantee in the state, which felt that its needs had not been adequately met by the combined system, resulting in reduced funding and eventually the termination of the 402 grant.[169]

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[168] A survey by the National Association of State Directors of Migrant Education (NASDME) noted this problem. One respondent commented: "The others look at coordination as 'How much money do you have for us?' or else there is apprehension: 'Do you want our money?'" Testimony of Beth Arnow for NASDME, before the National Commission on Migrant Education, Buffalo, April 29, 1991, at 2-3.

The disinclination of coordination bodies to deal with resource reallocation issues is understandable, but it should be resisted. Better provision of comprehensive services may sometimes require difficult decisions about resource shifting. Although it is not easy to create coordinating bodies with this capacity, we recommend that those states currently lacking a state-level coordinating body create one, with representation from all interested parties, both public and private. The body should have a specific mandate to examine resource issues, with authority to recommend changes in service allocations. It should also encourage well-focused local coordination efforts.

C. Definitional Issues

When asked in the abstract about obstacles to coordination among MSFW assistance programs, service providers and officials commonly cite the varying definitions that govern in the separate regimes.[170] But our field interviews failed to turn up widespread evidence of significant concrete problems caused by the differing definitions. Many local service providers had to think long and hard before coming up with examples of how differences in definition impeded coordination, and many of the examples seemed to be nuisances rather than systemic barriers to coordination. For example, MH and MHS sometimes were frustrated that some of their clients could not make use of JTPA 402 vans or other transportation services, because of JTPA's more restrictive eligibility criteria. Others noted that different definitions make it harder to consolidate outreach and intake processing, and may discourage the programs from even attempting such cooperation. Several persons interviewed noted the wastefulness of sending numerous outreach workers (it could be as many as seven or eight) to burden a farmworker family with many of the same questions, even if each worker does spend part of his or her time asking certain questions that are germane only to the particular assistance program at issue. The Indiana and Iowa efforts indicate, of course, that considerable progress can be made in consolidating intake processing, even while different definitions govern the various programs. But the psychological barrier remains.

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[169] Much of this problem appears to have resulted from a misunderstanding. The consolidated outreach staff saw its task primarily in terms of developing full information on the MSFW population in the state, not as encouraging individuals to enroll in particular programs. This approach served other programs reasonably well, for they could generally rely on other incentives (like an obvious need for day care or medical treatment) to bring about actual use of their services. In contrast, JTPA is more dependent on proactive recruiting to persuade individuals to join programs that take them out of the workforce for training. See Part II.D. supra. The former JTPA grantee in Indiana, a state agency, waited for the Consolidated Outreach Project to fill this recruitment need, rather than supplementing the more limited consolidated efforts with its own recruitment staff. As a result, the number of enrolled JTPA 402 participants remained quite low, and that JTPA grantee eventually lost the grant. The new JTPA grantee in Indiana, a private nonprofit, has declined to take part in the consolidated outreach program.

[170] A recent poll of MHS grantees, for example, found strong support for the notion that the different definitions impede interagency coordination and for the proposal that a single definition of migrant should be adopted and used by all agencies. Fuentes testimony, supra note 78, at 15.

Other consequences of definitional differences were also mentioned by some we interviewed, but it proved difficult to pin down specific details. We were told that promising cooperation between programs sometimes foundered because of "political fallout" once farmworker parents learned that some of the children would be excluded from one portion of a combined program, owing to different eligibility standards. For example, we heard in general terms of a Migrant Education program's agreement to facilitate the efforts of the local Migrant Head Start by offering space in a summer school building and permission to use ME buses for transportation. The Migrant Health clinic agreed to provide health screening and inoculations. But when the ME buses went out to pick up children for the MHS program, the driver had to exclude "formerlies." Angry parents called the school board, which then decided that the cooperative effort should be discontinued.

Obviously in this case definitional differences were not an absolute barrier to coordination; it should have been possible to sustain the combined program, given additional effort to explain the situation, ride out the immediate negative reaction, or provide alternative assistance of a similar type to those excluded from MHS. But the differences did complicate matters. And viewed in a larger perspective, it may not make sense to have two educational efforts, ME and MHS, reaching such markedly different constituencies.

Based on such a line of argument, some we interviewed argued for a procedure whereby coordinated programs could overcome such problems by means of a waiver procedure (which would probably require statutory amendment). They proposed that by qualifying for one of the cooperating programs, an individual (or family) could have access to all the others, whenever local service providers in the various programs negotiated arrangements for coordinated or integrated services. In the above example, children could ride the ME buses to the MHS program if their families met the relevant definition for either ME or MHS. Or to pursue the example further, a seasonal farmworker enrolled in a lengthy training program under JTPA 402 would be eligible for child care at the local MHS center, even though it had been more than a year since he or she last migrated to undertake agricultural work.

This cross-eligibility or waiver proposal holds some initial attraction, but it also gives rise to important questions. The net result would clearly be an expansion in the population eligible for any one of the given programs. Unless coupled with either a major funding increase (unlikely in the present budget climate) or some other rationing mechanism to replace the original definitional limitations, it might only lengthen waiting lists, exacerbate uneven service, or dilute the level of assistance to the primary target population of a program. Moreover, it would amount, in practice, to a kind of uniform definition, but one that incorporates the most expansive features of each of the programs' definitions. If there is to be some such de facto uniformity, perhaps it should result from direct decisions on each of the elements of the definition (see Part IV infra), sometimes choosing expansive criteria, sometimes choosing narrower ones as a way of better targeting limited resources. Cross-eligibility might also encourage some manipulation or reward the canniest applicants for services. For example, a seasonal farmworker who had never migrated but who wanted to enroll his children in MHS or ME could achieve this objective by first qualifying for MH or JTPA benefits, both of which include seasonals. Other seasonal farmworkers who applied directly to ME or MHS, however, would not be eligible, at least not without eventually following the circuitous route of the first.

These problems should give serious pause before embarking on a waiver or cross-eligibility procedure. Nevertheless, it is not clear just how substantial they might be in practice. (Some interviewees speculated that enough resources might be saved by the elimination of duplicative eligibility determinations to pay for the additional services.) It might therefore be worthwhile to test this proposal in the field by a more limited statutory amendment allowing the designation of some local areas for pilot projects. The task of selecting the pilot locations and working out the exact ground rules for such waivers could be assigned to a federal coordinating entity (as discussed in Part VI).

In any event, even complete uniformity in the federal definitions would not usher in a new era of simple interagency coordination, for a straightforward and important reason. From the perspective of the service provider in the field, seeking to help clients draw on other services available locally, these federal programs form only part of the picture. Most localities do not have all of the Big Four assistance programs. If there is no Migrant Health clinic locally, ME or MHS personnel seeking health care for one of their students will probably have to work with a local physician's organization, a local hospital, or perhaps with a state-funded health clinic, or they may turn to private sources of support. Many of these agencies or organizations will have their own eligibility criteria, which may or may not include a definition of MSFW. If a client does not qualify for one of these sources of assistance, effective local service providers do not spend a lot of time grumbling about definitions; they simply go on to look for another source of support.

Given the diversity of assistance programs available under our federal system, therefore, coordination will have to occur primarily at the local level, taking into account the full range of relevant programs available in that location, both MSFW-specific and general, and both public and private.[171] State and national coordination initiatives can still be useful, however, to promote such local initiatives and to find incremental ways to overcome existing barriers. Constant and creative prodding from such quarters can also help to stimulate local initiative and to overcome personality conflicts. In sum, as many interviewees observed, the absence or ineffectiveness of local and state coordination probably has more to do, overall, with lack of local initiative or personality conflicts than with structural barriers; definitions can serve more as an excuse than an explanation.[172]

D. Recommendations

We recommend the creation or improvement of state-level coordinating bodies to look for statewide initiatives that can make more efficient use of service resources. These bodies should also attend to ways to promote better local-level integration or cooperation. As to definitions, we cannot conclude that the current diversity in federal definitions imposes a highly significant barrier to coordination. Coordination is clearly possible without a uniform federal definition, and considerable local initiative for coordination would still be necessary, even if there were a uniform federal definition, given the diversity of local resources available.

Moreover, differing federal definitions took root, in part, for understandable reasons relating to the specific service missions of the varying programs. Immediate mandates to force definitional uniformity are therefore likely to provoke considerable political resistance. We were frequently reminded during interviews, for example, of a Reagan administration proposal to cut the Migrant Education look-back period from 5 to 2 years. After acrimonious controversy, it was successfully beaten back by the affected agencies, and Congress reaffirmed the 5-year period.

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[171] One ME state director commented: "All of the Migrant-specific programs can coordinate their hearts out, but there still are not enough resources in sight to serve this population unless there is improvement in access to the mainstream programs." Glover letter, supra note 33, at 5.

[172] One ME state director concluded: "Within the existing statutory/regulatory framework, the degree of effective coordination possible seems to be limited only by the initiative, energy and good will of the service providers at the state and local levels." Arnow testimony, supra note 166, at 2. See also Mull testimony, supra note 119, at 7 ("personality conflicts can sometimes be translated into policies that discourage productive coordination.").

Despite these cautionary notes, we do recommend steps in the direction of a uniform definition, for two reasons. First, we believe that consolidated outreach offers real hope for improved service to individuals, both by cutting down on the wasteful use of staff time in intake processing and by reducing the burden on MSFW families. As long as there are separate programs, individual program intake and questioning cannot be completely supplanted, as the Indiana and Iowa experience indicates. But economies could be achieved. Reducing the disparities among the definitions might help encourage the development of consolidated outreach forms, even if separate programs retained some differences in definitions and eligibility criteria that are truly justified by the nature of the particular program.

Moreover, many officials and service providers interviewed pointed to another important reason for a uniform definition--at least a core definition for certain purposes. They reported considerable frustration at being unable to provide legislators or others with an agreed count of migrant farmworkers, nor even of the wider category of seasonal farmworkers. An agreed census or estimation mechanism should help them argue for their budgets. It would also help identify the real needs and the appropriate regional or local distribution of funds meant for MSFW services--a targeting function that is not well served at present.

Finally, we believe that experience with a uniform core definition, perhaps used initially only for population counts or for part of the outreach process, would have beneficial long-term effects. Over time, it may ease the concerns that have in the past sparked resistance to proposed changes in the definitions governing particular programs, and may facilitate incremental progress toward more uniform eligibility criteria.

IV. Data and Definitions: Toward a Uniform Core Definition

A. Migrant Worker Data and Definitions

1. Introduction

Although inconsistent definitions may not wholly impede local coordination efforts, the lack of a core MSFW definition does hamper the ability of the federal government to determine the needs of, and to target resources to, the migrant population. This section pursues these issues and recommends improvements.

How can a uniform core definition of MSFW be developed? It has never been easy to define migrant and seasonal farmworkers, or to agree on their number, characteristics, and distribution. Many farmworker advocates blame governmental indifference for persisting disagreements over how many MSFWs there are. These critics often note that migratory birds seem more important to the federal government than migratory workers, since the federal government allegedly has better data on migratory birds than migratory workers.[173]

Farmworkers have been excluded from federal labor law protections and were initially neglected in federal antipoverty programs, but another reason for the lack of reliable data on them is that migrant farmworkers are hard to define. Logically, migrant is an attribute of a subset of persons whose occupation is farmworker. U.S. labor force data can apply age, sex, or race attributes to workers in particular occupations and industries, but they cannot distinguish migrants from other workers. For example, the DOL Standard Occupational Classification (SOC) manual defines six types of farmworkers, such as general farmworkers (SOC 5612) and vegetable (5613) and orchard (5614) workers, but not migrant farmworkers. Similarly, the DOL Dictionary of Occupational Titles distinguishes farmworkers in the grain, vegetables, fruits and nuts, field crops, and horticultural industries, but it does not include listings for migrant or seasonal workers within these farmworker occupations. Hence, one cannot simply look up migrant farmworker in regularly published occupational data.

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[173] T. Moore, The Slaves We Rent __ (1965).

Since MSFW does not appear in normal data sources, two major methods have emerged to estimate their number and distribution. Most common are bottom-up estimation procedures, which begin with a count or estimate of the number of MSFWs in each county or state, adjust these data to reflect MSFWs who were not included in the count or estimate, then add dependents, and thus produce an estimate of the number and distribution of MSFWs and their dependents for states and perhaps counties.[174] An alternative top-down approach begins with the total number of farmworkers (or another overall indicator of farmworker activity such as wages paid to hired workers), and then adjusts downward to isolate the subset of MSFWs of interest.[175]

Both procedures have advantages and disadvantages. Bottom-up procedures begin with the population of interest, but subsequent adjustments presume that the analyst has more knowledge of MSFWs than the local person who originally made the baseline estimates. Top-down procedures, by contrast, usually begin with better data, but they must make often arbitrary assumptions to isolate the MSFW subset of all farmworkers.

The problems inherent in both bottom-up and top-down procedures have prevented either from emerging as the generally accepted procedure. Even worse, from an analytical perspective, few studies using either procedure have ever been done twice (the usual practice for cross checking) so that, in the case of MH, studies done in 1973, 1978, 1985, and 1988 were in no way cumulative or self-correcting.[176] It appears that at least $100,000 has been spent annually by nonME federal MSFW assistance programs to estimate the number and distribution of MSFWs and their dependents, or at least $1.5 million since the mid-1970s, but there is no agreement on the number and distribution of MSFWs. Experience has not even produced agreement on a procedure to determine their number and distribution.

Because there has been relatively little progress in getting reliable data on MSFWs, it is still possible to reevaluate the virtues of bottom-up versus top-down estimation procedures. An improved bottom-up procedure might, for example, build on an improved MSRTS, while an improved top-down procedure might be based on a modified decennial Census of Population (COP) questionnaire or an expanded National Agricultural Workers Survey (NAWS).

We recommend that the number and distribution of MSFWs should be based on regularly published labor data that are not tied to or generated by any MSFW program, and that the characteristics of MSFWs that might modify the distribution of funds be based on a Department of Labor worker survey such as the NAWS. Establishing this sort of independent system should be a major priority for any new national-level coordinating agency (as we recommend in Part VI). This agency should arrange with an established statistical body such as the DOL's Bureau of Labor Statistics, to make annual, biennial, or quinquennial estimates of the target population of MSFWs in each state and, if needed, in each county.

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[174] See Harvest of Confusion, supra note 2, at 75-94 (1988) for an explanation and review of bottom-up estimates of MSFWs.

[175] See id. at 99-109, for an example of a top-down procedure for estimating the distribution of migrant activity across states.

[176] Id. at 84-88.

2. The Harvest of Confusion

With each MSFW assistance program having a unique definition, and estimates of MSFW target populations based on a mixture of top down and bottom-up procedures, and with federal farm labor data painting very different pictures about a typical migrant, it is not surprising that there is a harvest of confusion over the number, characteristics, and distribution of MSFWs. Some of this confusion is due to the gap between the stereotype and the definition of a migrant farmworker. The stereotype is that virtually all minority workers in the fields are migrants; many definitions, on the other hand, include Iowa teenagers as migrants but not Mexican-born families settled in California who each day commute from their homes in farmworker towns to the fields. Varden Fuller once observed that highway drivers who see a crew of Hispanic workers hoeing assume that all of the hoers are migrants, and the white tractor driver is not, while the opposite may be the case under, e.g., a cross-county-line and stay-away-from-home-overnight migrant definition.[177]

Confusion also arises because there is a persisting myth that "millions" of people live in the southern parts of the United States and follow the ripening crops north. A typical description is that "three streams of people ... flow and fan northward, travelling from their homes around Florida, Texas, and California to distant places."[178] The map that accompanies this description has heavy black arrows which show how Florida-based migrants move up the Eastern Seaboard, Texas-based migrants fan out across the midwest, and California-based migrants move within the state and north into Washington and Oregon. The arrows indicating a south to north migration of workers help to explain the nautical flavor of migrant labor discussions: states are upstream or downstream, and there are major currents and cross currents. However, farm labor scholars have usually emphasized that the picture of migrants flowing south to north lent a false precision to an unorganized migration and exaggerated the flow of workers. Varden Fuller noted in 1984 that "the major change that has occurred in respect to seasonal farm labor is the decline in migratoriness ... no less important than the decline in physical magnitude is the decline in the myth."[179] During the mid-1960s, when the federal government launched programs to assist migrant farmworkers and their children, imprecision in definitions and numbers did not seem so important because there was a sense that migrant farmworkers would soon be displaced by machines. There was a temporary upsurge in the number of migrants in the mid-1960s,[180] when the federal government terminated the Bracero program.[181] Nevertheless, the children in migrant farmworker families were not expected to be able to follow in their parents' footsteps because of mechanization.[182] Without federal assistance, the argument ran, migrants and their children would be unprepared for nonfarm jobs. Definitions of the migrant farmworkers to be served, as well as the distribution of available funds, for example, between health and education services or between upstream and downstream states, were ad hoc in this era when migrancy was considered a soon-to-be-closed chapter of American history. Migrancy, however, did not disappear. The number of MSFWs stabilized and even increased in some areas as labor-intensive agriculture expanded faster than mechanization displaced workers on the fewer and larger farms that accounted for most U.S. fruit and vegetable production.

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[177] Fuller, Introduction in R. Emerson, Seasonal Farm Labor in the United States, at x (1984).

[178] R. Goldfarb, Migrant Farm Workers: A Caste of Despair 3 (1981).

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[179] Fuller, supra note 175, at xi.

[180] As estimated by a Department of Agriculture analysis of supplementary questions attached to the December Current Population Survey (CPS), the number of migrant farmworkers rose 21 percent, from 386,000 in 1964 to 466,000 in 1965, before falling to 351,000 in 1966 and then averaging 200,000 during the 1970s. The definition used by USDA to analyze CPS data required persons 14 and older to cross county lines and stay away from home at least one night to be considered migrant farmworkers.

[181] The Bracero program refers to the series of agreements that permitted almost 5million Mexican farmworkers to enter the United States on a temporary basis to do farmwork between 1942 and 1964. There were 5 million entries, but some workers returned year-after-year, so that perhaps only 1 million Mexicans participated. One commentator concluded that the Bracero program was responsible in part for the 1960s migrant programs and protective legislation because Braceros had rights and privileges under the contracts growers were required to provide that U.S. farmworkers did not have. Craig, The Bracero Program 200 (1971).

[182] For example, during the 1964 debate on what became the Economic Opportunity Act of 1964, the National Sharecroppers Fund Secretary used his understanding that a mechanical lettuce harvester was coming to support his assertion that "machines are replacing men on the farm as they are in the factories." Quoted in Klores, supra note 7, at 10. As of 1991, no lettuce is harvested mechanically in the United States.

3. The Number and Distribution of Migrants

Most newly begun federal service programs try to determine the number and distribution of their target population and then allocate funds to areas with eligible clients in proportion to their share of the national need. The number and distribution of target populations are often established with the decennial Census of Population (COP). However, migrant farmworker programs are different; only the JTPA 402 assistance program allocates funds to states on the basis of COP data. The other migrant assistance programs rely on their own data systems or they ask grantees who apply for funds to prove that there is a target population to be served. For example, Migrant Education funds are allocated on the basis of an ME-specific counting system, the MSRTS, and Migrant Head Start (MHS) and Migrant Health (MH) require applicants for funds to demonstrate the existence of a needy target population in the area to be covered by the grant. National administrators in such grantee-driven programs agree that there is no reliable system in place to ensure that the distribution of funds is related to the distribution of the target population instead of the distribution of the best grant applications.

Studies to rationalize the allocation of migrant assistance monies have mostly been of the bottom-up type. That is, the study began with acknowledged flawed local estimates of migrant and seasonal workers and then "adjusted" these estimates to determine the number and distribution of eligible workers and dependents. During the 1970s, most studies began with the monthly Employment and Training Administration estimates (reported as ETA-223 data) of the number of migrant and seasonal workers employed during the week which includes the 15th of the month in areas with significant farmworker activity (one or more counties with 500 or more farmworkers or any H-2A temporary foreign workers). These local ETA estimates were then adjusted by the person making the MSFW estimate to account for unemployed workers, alleged undercounts of workers employed, and the dependents of workers, to produce a count and distribution of the target population of MSFWs and their dependents. A review of these 1970s studies noted that many of the adjustments were contradictory, and that these studies were not building blocks to better estimates of the number and distribution of migrants and their dependents. Subsequent studies often ignored previous studies.[183]

Several 1980s studies continued this bottom-up procedure of adjusting flawed local estimates, but there were also attempts to make top-down estimates of the number and distribution of farmworkers. One study combined state-by-state data from the Census of Agriculture (COA), the Quarterly Agricultural Labor Survey (QALS), and the Current Population Survey (CPS) to distribute migrant activity across states, and then demonstrated that there may be 600,000 to 1.2 million migrant farmworkers in the United States, depending on definition.[184] The NAWS, a national worker survey established by the U.S. Department of Labor after the enactment of the Immigration Reform and Control Act of 1986 (IRCA)[185] to determine whether there were farm labor shortages that required the admission of additional agricultural workers, similarly used COA and QALS data to develop a sampling frame to select farmworkers to interview. Based on a definition that counts as migrants those who travel at least 75 miles from their usual residence to do farmwork, the NAWS found that 42 percent of its sample workers were migrants. If the total farmworker population is 2.25 million, then there would be 940,000 migrant workers.[186]

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[183] See Harvest of Confusion, supra note 2, at 77-98.

Program-generated data cannot be improved enough to estimate the total number and distribution of MSFWs, unless each program has at least a uniform core definition and some programs serve all of their target populations. Program service data today do not reflect the total migrant population because no program serves all of the eligible MSFWs and dependents, and service data do not reflect persons who are not MSFWs under one program but may be migrants under another program definition. Without a uniform federal definition, each MSFW assistance program develops an estimate of its eligible population, and these eligible population estimates are like circles that partially overlap. However, despite differences in definition, by some estimates, roughly 80 to 90 percent of the migrants as defined by one program are also migrants as defined by the others.

Even if most of the persons served by MSFW programs do fall in the eligible-for-one and eligible-for-all migrant program group, estimates of the total migrant population based on persons served may miss migrants in areas not currently served by assistance programs. The estimates may also be affected by different levels of outreach and funding. For these reasons, it is preferable to determine the number and distribution of MSFWs from a census or sample survey rather than from the enrollment data of programs that have different definitions of migrant workers.

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[184] See id. at 107. Based on detailed 1984 California Unemployment Insurance data, there were 600,000 migrant farmworkers if migrant was defined as a worker having at least two farm employers in two counties; 1 million migrant workers if migrant was defined as a worker having a farm job outside the worker's base or highest-earnings county; and 1.2 million migrants if migrant was defined as a worker having a farm job in one county and a farm or nonfarm job in another county.

[185] Pub. L. No. 99-603, 100 Stat. 3359. The NAWS was designed to determine whether there were farm labor shortages that would have triggered the admission of "replenishment agricultural workers" under §303 of IRCA, 8 U.S.C. §1161 (1988).

[186] Richard Mines, Memorandum (mimeo, March 1992).

There are several sources of farm labor data that might be relied on to estimate the number and distribution of MSFWs. The decennial Census of Population (COP) has not been considered reliable enough to estimate the number and distribution of migrants because, as noted earlier, the COP asks respondents about the work they did in the week before the Census, and the last week in March finds employed only one-third of the people who do farmwork during a typical year. However, some of the JTPA 402 program participants, whose funding is based on COP data, believe that a slight modification of one or two COP questions could make the COP a valuable source of data on farmworkers, although even a modified COP could not distinguish those farmworkers who migrate.[187]

Most labor data come from the monthly Current Population Survey (CPS), which interviews people in 60,000 households to establish, inter alia, national and state unemployment rates. The CPS is not used extensively today to study MSFWs because it is based on the assumption that each of the 80 million housing units in the United States has an equal probability of being in the sample, and the CPS is believed to miss many MSFWs because of their nontraditional housing. However, until 1987 the CPS included a December supplement which asked if anyone in the household had done farmwork during the calendar year. About 1,500 households in the December CPS included a farmworker, and in these households, data were collected on where the farmworker worked during the year as well as his farm and nonfarm earnings.

The U.S. Department of Agriculture (USDA) analyzed these CPS data to estimate the number and characteristics of migrant farmworkers, as defined by USDA. The USDA defined migrants as persons who crossed county or state lines and stayed away from home at least one night during the year to do farmwork for wages. USDA defined farmwork to include crop and livestock agriculture, but to exclude the processing of crops and livestock, and USDA imposed no occupational, earnings, or legal status criteria. As a result, veterinarians as well as field hands could be migrants, and legally authorized as well as illegal alien workers were included. Teenagers in Hispanic families who migrated from Texas to Michigan could be migrants, as well as Iowa teenagers who lived and worked on an uncle's farm in another county during the summer. According to USDA's analysis of CPS data, there were 115,000 to 226,000 migrant farmworkers in the United States in the 1980s, with one-fourth of them concentrated in the southeastern states.[188]

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[187] The suggested modification to the COP would ask respondents what amount or percentage of their earnings in the year preceding the COP were from farmwork so that a respondent not employed as a farmworker in March but with farm earnings during the previous 12 months can be identified.

The CPS data became suspect because, as the 1980s unfolded, they continued to picture a largely white and teenage migrant workforce, whereas MSFW assistance programs and other data were reporting an increasingly adult and Hispanic workforce. In the mid-1980s, for example, the CPS data found that about one-fourth of the 160,000 migrant farmworkers in the United States were mostly white youth in the midwest. The NAWS, by contrast, which was established in 1989 to determine whether immigration reforms caused farm labor shortages, reported that MSFWs are mostly Hispanic adults who were born abroad. For example, in 1990 two-thirds were born abroad (usually in Mexico), and their median age was 31.[189]

B. Estimating the Farm Labor Population

1. Farm Labor Data

This section reviews the data sources available to estimate the number and distribution of MSFWs according to a core definition.[190] Agriculture has always been the most difficult sector for which to obtain reliable employment-related data. There are several reasons, including the spatial dispersion of the industry, the seasonality of employment, the large number of small employers and casual employees,[191] and the unique division of responsibility between USDA and DOL in collecting and analyzing farm labor data.

Employment and wage data record what happens in labor markets--the number of people hired and their characteristics, the wages they are paid and their fringe benefits, and how long they stay with a particular employer or in a certain industry or occupation. No single data source can give a complete picture of the people in a particular labor market. Instead, the labor market can be imagined as a room of unknown size and shape, and each data source can be thought of as a window which provides a view into the room. The completeness of the data is indicative of the size of the window, and the reliability of the data is suggestive of the quality of the view.

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[188] Victor Oliveira, Trends in the Hired Farm Workforce: 1945-87, at 5 (USDA, ERS, Ag Information Bulletin 561).

[189] NAWS Findings, supra note 3, at 11.

[190] Table 3, infra, outlines the concepts that must be defined in order to develop a core definition, and it includes recommended definitions, justifications for them, and some of the effects of adopting them.

[191] Casual employees refers to the large number of farmworkers who are employed in agriculture for only a few weeks, and who are then out of the U.S. labor force or employed in another job the rest of the year. There are also large numbers of paid and unpaid family workers in agriculture.

There are three major types of labor market data. Establishment or employer-reported data are obtained from employers. Most labor market data are obtained from employers because it is cheaper to survey a sample of or to take a census of the nation's 7 million employers than to interview a sample or census of the 140 million persons in the U.S. labor force sometime during each year. Establishment data usually describe jobs: they report, for example, the number of employees; wages paid, hours worked, and benefits offered; and duration of employment with this employer.

Household data are collected from individuals and households. These data include the personal characteristics of workers as well as data on spells of unemployment and movement between employers, industries and occupations. Some household data do not change (race and sex), other data change in a predictable fashion (age), and some can be obtained only through repeated interviews (employment status).

Establishment and household data can be collected through censuses or sample surveys. A census obtains data from everyone; a sample from only a subset of the group. Data obtained from random samples can be examined so that the analyst can report that the sample results are what a census would have yielded within certain bounds. For example, a sample wage of $5 ± 25¢ means that a census (or another sample) could produce a wage of $4.75 to $5.25, e.g., 95 percent of the time.

Establishment and household data are not the only sources of labor market information. Administrative data, the third major type, also provide useful ways to look into the labor market room. Administrative data are collected for tax purposes (quarterly unemployment insurance (UI) reporting), regulatory purposes (farm labor contractor registrations), and funding or client purposes (ME or MH intake data). Administrative data can be censuses, as UI, contractor registration, or pesticide reporting are supposed to be, or samples, such as social service intake or client data are. However, tax and regulatory administrative data may be incomplete if employer-reporters have incentives not to report or to underreport employment and wage data, and client or intake data may provide a biased or skewed picture of the underlying population. For example, JTPA 402 data may reflect only the legally authorized farmworker population interested in training, while ME data may provide data only on the migratory parents of children aged 3 to 21 that recruiters locate.

2. Definitional and Conceptual Issues

Employment and wage data begin with definitions and then develop enumeration procedures to estimate the number and distribution of workers in the group. To enumerate farmworkers, agriculture and farmworker must be defined. This is a much more challenging task than most casual observers would realize. This section explores some of the complexities.

In most farm labor data, a farmworker is a person who works for cash wages on a farm (farm operators and unpaid family workers, by contrast, share in the farm's net income), so the first critical definition is what constitutes a farm. Most data sources at least attempt to define a farm as the term is defined in the Census of Agriculture (COA): a farm or agricultural enterprise is any place from which $1,000 or more of "agricultural products" were sold or normally would have been sold during the year. Agricultural products can be livestock or crop products sold to other farmers (such as calves or hay) or sold to retailers or consumers (such as strawberries), or commodities that are sold for further processing or distribution (such as peaches produced on a farm but canned in a nonfarm establishment).

Farms as defined by the COA can be assigned to Standard Industrial Classification (SIC) codes that reflect the farm's primary commodity, or the commodity (group) which generates 50 percent or more of the farm's sales. The COA divides the farms that satisfy its definition first into crop (SIC 01) and livestock (02) categories, and then into more detailed 3-digit SIC commodity codes such as fruits and nuts (SIC 017), and four digit codes such as grapes (SIC 0172). Diversified farms without a dominant commodity are classified as general crop farms (SIC 0191) if they primarily sell crops, and as general livestock farms (SIC 0291) if they primarily sell livestock commodities.

Agricultural service firms are not farms, but they often employ workers who do farmwork for wages on farms. Agricultural services (SIC 07) include soil preparation (071), crop services (072), and farm labor and management services (076). The service firms in these SIC codes usually employ workers who work for wages on a farm, but these "farmworkers" are sometimes included and sometimes excluded from farm labor data. Most agricultural service firms are not based on farms, such as a farm labor contractor who operates from his home in town or an agricultural chemical applicator with an office in the business district. Thus, sampling methodologies based on lists of farmers or parcels of land may miss them. Some of the agricultural service firms that have farm addresses may still be overlooked. For example, some larger farms that grow labor-intensive fruits and vegetables operate with four or five corporations, including, e.g., a farm labor contractor business and a chemical application business that share an office with the farm business.

These on-farm corporations can supply workers to the farm business or for the associated farm and other farms, and the workers may or may not appear in farm labor data.

The proliferation of agricultural service firms reflects farmers' growing dependence on them. Farm production is concentrated on a relative handful of large farms. In 1990, the nation's 2.1 million farms had 170 million in cash receipts from selling farm products. The largest 16,000 farms--less than 1 percent of all farms--accounted for one-third of all farm sales, and the largest 5 percent accounted for 60 percent of all farm sales.[192] Many of these large farms employ accountants and marketing representatives, operate packing sheds or gins to handle their products, and buy equipment to fertilize or apply chemicals. As a result, accountants, packing shed workers, and chemical applicators employed on large farms are sometimes considered farmworkers in data reported by farm operators and sometimes considered to be agricultural service workers, depending on the structure of the farm business and the sampling procedure. If these workers are provided to the farm by an outside or independent agricultural service firm, their indirect hiring may make them nonfarm workers.

The "farmworker" status of an individual employed on a farm by an agricultural service firm depends on factors such as what type of employer they have, who owns the facility in which they work, and what it does to farm products. Construction workers employed by a nonfarm contractor who is building a building on a farm are not usually considered farmworkers, but workers employed by a farm labor contractor who prune grapes and repair trellises usually are considered farmworkers. The workers who pick peaches are usually considered farmworkers whether they are employed by a farmer or by a contractor, as are the workers employed in a peach packing shed on the farm that packs mostly the peaches grown on that farm. But if the peach packing shed handles peaches, for example, from ten equally-sized growers, then it is not considered a farm enterprise and is classified in the SIC code as 0723 (crop preparation services for market) or 5148 (fresh fruit and vegetable wholesaling). As a result, the workers may or may not be considered farmworkers.

Farm enterprises can be classified in the SIC as farms or nonfarm agricultural services, and this means that standard industrial classification data on employment in agriculture may not agree with standard occupational classification data on what workers actually do. When workers are asked in a household survey if they worked for wages on a "farm" during the past year, such ambiguities abound. A "farm" is defined to exclude agricultural service firms in the Census of Agriculture (COA), but "farm" is not defined in the CPS supplement used to collect data for the USDA Hired Farm Working Force (HFWF) household survey.[193]

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[192] The largest 16,000 U.S. farms sell an average $3.7 million in farm products each, and have average net incomes of $1.2 million. The 60 percent of all farms that sell less than $20,000 worth of farm products annually account for less than 5 percent of all farm sales, and these small farms, on average, have lost $100 to $1000 each in the 1980s. Economic Indicators of the Farm Sector: National Financial Summary, November 1991, at 44.

A worker employed by an agricultural service firm such as a labor contractor or a livestock veterinarian may respond in a household survey that he or she did farmwork during the past year and thus be considered a farmworker in household data. But establishment data such as the COA do not consider agricultural service firms to be farm employers. Thus they may exclude these agricultural service "farmworkers." As a result, household and establishment surveys may be reporting different numbers and characteristics of "farmworkers."

Farmworkers can be defined by where they work or by what they do. In establishment data such as the Census of Agriculture (COA) and Unemployment Insurance (UI) reports, all persons employed on a farm are considered farmworkers, including fieldworkers as well as clerical and professional staff, the executives of a corporate farm, and paid family members on a family-operated farm. However, if these workers are classified by occupation on the basis of what they do, rather than as farmworkers because they are employed in the industry of farming, some will be farmworkers but others will be clerks, accountants, and truck drivers. No regularly published data can determine how many persons classified as farmworkers in establishment data are also farmworkers in occupational data, but California UI claimant data suggest that only about two-thirds of the persons employed in the industry agriculture (SIC 01 and 02) have farmworker occupations.

3. USDA Interpretations of Farm Labor Concepts

The U.S. Department of Agriculture has had the most experience interpreting farm labor data. According to USDA, people who work on "farms" are divided into three groups: farm operators, unpaid workers, and hired workers. Farm operators are distinguished by working for a share of the profits or a share of the crop and not for an agreed-upon wage. The tendency of family farms to incorporate for tax and estate reasons, however, has converted some previously self-employed farm operators and unpaid family workers into hired farmworkers. About 15 percent of the wages paid to hired workers in the USDA FCRS survey are paid to workers related to the farm operator.[194]

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[193] The screening question is "During (past year), did (person) do any farmwork for cash wages or salary, even for one day?"

Unpaid workers are usually family members related to the operator who indirectly benefit from farm profits but are not paid cash wages. Unpaid workers are defined in the USDA's Quarterly Agricultural Labor Survey (QALS), for example, as all persons who worked at least 15 hours during the survey week on a farm and were not paid a wage or salary.

Hired farmworkers are all persons who work for wages or a salary on a farm. In most data sources, the minimum time that must be worked for wages is 1hour, and 1spell (hour) of farmwork makes a person a farmworker for a particular year, even if the person was primarily a student, housewife, or nonfarm worker during the year. Thus, all persons who had any paid farm employment during the year, including field and livestock workers, equipment operators, bookkeepers, mechanics, and entomologists, veterinarians, and other professionals are considered to be hired farmworkers in USDA's interpretation of CPS data. If agricultural service firms are also considered farm employers, then a secretary in the urban office of a crop protection service may be considered a hired farmworker.

Farm operators, unpaid workers, and hired farmworkers live in single person or family households. The family households pose especially difficult problems for determining the number of dependents in hired farmworker households. In the USDA Hired Farm Working Force (HFWF) reports based on the Current Population Survey (CPS), and under some MSFW assistance program regulations, the presence of one person who did qualifying farmwork for wages makes the entire household a farmworker household. The one farmworker may be the household head, the spouse, or a child, so that "farmworker households" often include both farm and nonfarm workers. The migrant subset of hired farmworkers is even more complex: since one migrant farmworker makes the entire household a migrant household in most data sources, a teenage student in an urban family can make the family satisfy the migrant farmworker definition for one year with a summer job away from home.

The final conceptual complication in farm labor data is the difference between farm jobs and farmworkers. Agriculture offers a fluctuating number of jobs, and some farmworkers move from farm to farm and enter and exit the farm workforce several times during the year. Several data sources estimate the number of workers employed or the number of jobs offered during a particular time period. For example, the USDA QALS survey asks a sample of farm employers how many hired workers they employed during the *week* which includes the 12th of the month, while the CES-ag program (California only) follows the Bureau of Labor Statistics practice of asking employers to report the total number of employees on their payrolls for the *payroll period* which includes the 12th day of the month. Most agricultural payroll periods for farmworkers are weekly, but mechanics and office staff, who are also included as wage and salary workers on farms, are often paid biweekly.

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[194] USDA normally permits operators to identify themselves, with a limit of one operator per farm. Thus, the factory worker who tends chickens in the evening can be a farm operator, as can the retired farmer whose farm is operated by his sons. If a farm incorporates, then all of its employees can become hired workers.

Workers employed and jobs offered are not identical, even for a survey week, because of worker turnover and varying job durations. If worker turnover is high, two or three workers may be hired during the survey week to fill one job slot, so a survey of worker employment during a particular time period must distinguish between total employment (all names on the payroll) and average employment (the average number of workers employed or jobs offered during a one or two week survey period). Survey week jobs may be of different durations: no survey directly distinguishes between a job or worker employed for one hour on one day of the survey week and a job or worker which involves 40 hours. However, labor expenditure and hours worked data indirectly indicate the duration of employment.

The major farm labor data sources are summarized in Table 2. These data sources are grouped by their purpose and the source.

Table 2. Defining Farmworkers: Conceptual Issues

Term	Sample Definition	Source	Sample Data Item	Issue
1. Farm and farmwork	All work done for wages on a place which sells farm products worth $1,000 or more	Census of Agriculture	In 1987, COA labor expenditures were $12.7 billion	- Includes wages paid to hired workers and FLCs as well as family members, clerical workers, and corporate officers. - May miss some agriculture service wages; labor expenditures are more than hired farmworker wages
2. Farmworker	a. Person who did farmwork for cash wages or salary	CPS-HFWF	In 1983, there were 2.6 million hired farmworkers, including 9% migrants	- Sampling procedure based on housing units and interviews conducted in December, so many (Hispanic) farmworkers may be missed
	b. All persons employed on farms for wages during a particular period	BEA; ES-202	ES-202 reported that 44,000 crop and livestock employers hired an average 616,000 workers in 1986	- Includes all types of workers employed on farms; usually covers workers on the payroll for the payroll period that includes 12th of month
	c. Paid workers doing agricultural work during survey week by the type of farmwork they did	QALS	During the week of July 7-13, 1991, there were 3.7 million persons employed on U.S. farms, including 1.1 million hired workers and 0.4 million ag service workers	This survey conducted since 1910, may underestimate seasonal farmworker employment and may not generate reliable regional data

Table 2. (cont.) Defining Farmworkers: Conceptual Issues

Term	Sample Definition	Source	Sample Data Item	Issue
3. Migrant Farmworker	Crosses county lines and stays away from home overnight to do farmwork for wages	CPS-HFWF	159,000 migrants employed sometime during 1985	Based on a sample conducted in December of about 1,500 households which include at least one person who did farmwork during the past year. About 6% or 94 households included a migrant farmworker.
	Does 25 to 150 days of farmwork annually, obtains at least half of annual income from farmwork, and cannot return home at the end of a workday	ES-223	Local ES staff estimate MSFW employment each month. In 1982, an average annual 62,500 migrants; 1/3 in California, and 90% in 10 states.	No standard methodology for collecting data.
	The children aged 3 to 21 of farmworkers who cross school district lines to do farmwork	ME-MSRTS	In 1982, about 190,000 currently migrant students (FTE) were identified, and 216,000 formerly migrant students (FTE)	Recruiters determine the eligibility of children; school districts get funding for each child they enroll as a migrant

C. Steps in Defining the Population and Determining Eligibility for Services

1. The Process

Migrant farmworker definitions and programs are as diverse as the people they serve. Determining the target population and establishing actual eligibility for a migrant assistance program usually involves 6steps. First, agriculture must be defined, since the programs serve a subset of the persons involved in the industry of agriculture. Some programs cover persons employed in both crop and livestock agriculture, including fisheries (ME), while others include only workers and their dependents employed in, e.g., crop agriculture (MHS).

Second, "farmworker" must be defined. Most programs define farmworkers as persons who do or look for wage work in agriculture (as the program defines it), and some programs go further and define how little and how much farmwork an eligible worker must do by establishing earnings or income criteria. For example, HEP and CAMP require applicants for their assistance to have done at least 75 days of farmwork in the past 24 months. Most assistance programs define farmworkers as persons whose principal or primary employment is in agriculture, which usually means that at least 50 percent of the worker's worktime or earnings during the previous 12 or 24 months were derived from farmwork. Some also establish a maximum time in farmwork, in order to target their services on persons affected by the seasonality of the industry. In these programs seasonal farmworker is usually considered someone primarily employed in farmwork from a fixed base or home, usually for something less than constant employment year-round. ME, in contrast, does not require that the children it serves have parents who are primarily farmworkers.

Most programs give priority to migrants, the third step in defining eligibility. All migrant definitions include some concept of movement, although they vary in the border that must be crossed or distance that must be travelled. For example, ME requires that school district lines must be crossed; MH says only that a temporary abode must be established for the purpose of doing farmwork; MHS requires that the place of residence must have changed because of the search for farmwork. Some programs (MH, JTPA) also serve nonmigratory seasonal farmworkers and their dependents.

Determining whether a worker and dependents are eligible for services usually requires a retrospective look at a worker's employment and income history, and the fourth step is to determine how far back to look to determine eligibility. ME looks back 6 years, MH and JTPA 2 years, and MHS 12 months. This means that a migratory act or event makes a worker (and his dependents) eligible for services as a migrant for 1 to 6 years after the worker has stopped migrating.

The fifth step is to determine whom to serve. For example, with a few exceptions, ME serves the children, ages 3 to 21, of eligible parents, while MHS ordinarily serves children from before their first birthdays through age 5. Many programs also place earnings or income limits on eligible farmworkers. For example, JTPA 402 and MHS limit participation by comparing the incomes of persons wanting services to federal poverty income levels. In contrast, ME has no income criteria.

Finally, the sixth step is to decide exactly how and where to provide services. For example, should MHS grantees try to locate near hospitals or near other MSFW providers? Should ME use its funds to hire classroom teachers, provide rides for migrant children, or run seminars for migrant fathers on the importance of education? Should all states receive funding under the program's formula, or should there be a threshold excluding states with populations too small to make a separate MSFW program administratively feasible? Some migrant assistance programs are granted considerable flexibility in the range of services they can provide.

These six steps to determining target populations and eligibility--agriculture, farmworker, migrant, the retrospective look at an individual's farmwork, age and other individual traits, and how to provide the service--have generally evolved to become more inclusive over time. As we develop more fully elsewhere in this report, we believe that these largely unplanned and uncoordinated expansions have produced disjointed qualification requirements that increase administrative costs, especially those associated with outreach and intake processing, have sometimes generated unnecessary competition that impedes coordination between MSFW assistance programs, and have hampered effective targeting of limited assistance monies.

2. Improving the System: A Uniform Core Definition

As a first step toward reducing those problems, we recommend the development of a uniform core definition of MSFW. This core definition should be used, initially, for the development of a single reliable federal MSFW census or estimation system, independent of any of the current MSFW service programs. That system should produce a usable count of migrant and seasonal farmworkers, with data sufficiently detailed and current to provide a basis for allocating funds among grantees and regions, and also to keep track of population adjustments as agriculture evolves. We also hope that the experience gained in developing and implementing this system will encourage many of the programs to move toward applying a uniform definition for purposes of eligibility--but we do not advocate an immediate move in that direction.

Our recommended uniform core definition is outlined in Table 3. Agriculture should be defined as it is in the Fair Labor Standards Act (FLSA)--a labor law which provides farmworkers with lower levels of protection than are afforded to nonfarm workers.[195] The major effect of using this definition of agriculture on current MSFW programs would be to make MSFWs in livestock agriculture eligible for services, and to render ineligible those workers employed in nonfarm packing and processing. The logic of this core definition of agriculture is that specialized MSFW assistance programs exist largely to serve workers employed in the types of agriculture in which they are not treated like other workers by federal laws and regulations.

We next recommend that the core definition be limited to workers who have some minimum number of days worked annually (perhaps 25, the number used in the JTPA 402 regulations). A criterion specifying a minimum number of days worked helps to separate the less-than-25-day casual workers, who are 30 to 50 percent of all individuals employed as farmworkers during a typical year, from workers with enough attachment to the industry to suffer from its seasonality and migrancy characteristics. For similar reasons, the core definition might pay some attention to the maximum number of days worked; someone with full year-round employment is not seasonally employed. The core definition could use the 150-day limit once employed in CETA regulations. But if such a specification proves administratively cumbersome (as it did under CETA) the definition might simply require that farmwork not be a constant year-round activity.

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[195] The FLSA has a primary and a secondary definition of agriculture (see Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 762-63 (1949)):

"'[A]griculture' includes [primary definition] farming in all of its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and [secondary definition] any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." 29 U.S.C. §203(f) (1988).

These definitions emphasize that agriculture includes both the production and the processing activities that occur on a farm.

Similarly, the National Labor Relations Act limits the protections afforded to agricultural laborers. 29 U.S.C. §152(a)(1) (1988). Although the NLRA does not define the term, Congress has specified in appropriations legislation that agricultural laborer is to be understood as it is defined in the FLSA. See Bayside Enterprises, Inc. v. NLRB, 429 U.S. 298, 300 & n.6 (1977). The Internal Revenue Code uses a similar definition. See 26 U.S.C. §3121(g) (1988).

Table 3
Recommended Core Definition of MSFW

Topic	Recommendation	Justification	Effect
1. Agriculture/ qualifying work	Agriculture as defined in FLSA	Federal laws exclude or provide fewer protections for farmworkers, and this is one justification for federal MSFW assistance programs	Narrows some definitions, since most packing processing, and fisheries are excluded; widens some definitions (includes livestock)
2a. Farmworker	Person primarily employed in agriculture for wages; primarily employed can mean, e.g., more than 50% of earnings and/or days employed from agricultural employers	There are other programs that provide assistance for, e.g., poor farmers and unpaid family workers	Introduces new requirements for e.g., MH and ME
2b. Seasonal Farmworker	Primarily employed in agriculture with minimum (e.g., 25 days) and maximum farm employment (e.g., 150 days or "not constant year-round employment")	Helps to target assistance on those most affected by the seaonality of the industry	Introduces new requirements for e.g., MH and ME
Topic	Recommendation	Justification	Effect
3. Migrant Farmworker	Suset of seasonal workers who cross a county border and stay away from home overnight	Focuses on disruptions that most programs target. County borders and overnight stay are easy to understand.	Intoduces new requirements for e.g., MH and ME

4. MSFW Lookback Period	24 months	Helps to target assistance on current migrants, but allows for assistance during first year after settling out	Shorter than ME eligibility period; longer than that for MHS
Eligibility issues (not addressed by core definition):			
5. Age range to be served (and other individual qualifications)	Minimize overlap	Promote coordination and reduce overlap in services	
6. What services, where, and small state funding	Have coordinating body examine closely	All are becoming more important issues in the 1990s	

It might also be determined to limit the core definition to cover only those who are *primarily* employed in agriculture, to help target limited MSFW assistance funds on those most in need of such specialized services. If necessary, this requirement could be more precisely spelled out, to require that 50 percent of the individual's working days have been worked in agriculture or that 50 percent of annual earnings come from agricultural employment.[196] We recommend that persons meeting either of these criteria qualify under the definition, but the definition could conceivably require both for someone to be counted as "primarily" employed in agriculture.

The preceding steps identify the seasonal farmworker population. We recommend that migrants be defined as that subset of seasonal workers who cross a county border and stay away from home overnight to do farmwork. (To avoid some of the difficulties engendered by the subjective component in the ME definition, we recommend that the definition require actual performance of farmwork at the destination, not simply that the person went with the *intention* of doing farmwork.) The county boundary criterion follows other employment data and thus might allow for some cross-checking, and the stay-away-from-home-overnight criterion focuses on the disruptions associated with a change of residence that provide the rationale for many federal migrant programs.

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[196] If this criterion is used in program administration, it does potentially complicate eligibility determinations, because intake personnel might have to insist upon examining wage receipts. If this process becomes too cumbersome in view of the objectives of the particular program, program staff may wish to eliminate this requirement and rely simply on a threshold (e.g., 25 days) that will target services by excluding casual workers, as discussed in the previous paragraph.

The fourth criterion is the lookback period. We recommend a 24-month look back; that is, a farmworker would still be considered a migrant for 24 months after a qualifying move, and determinations of seasonal farmworker status could count any 12-month period within the last 24 months. We heard arguments for a shorter 12-month period (a timeframe that Congress adopted for several programs in the mid-1960s), particularly for programs that are focused on migrants, primarily in order to target limited resources on those whose lives have been most recently disrupted. But others argued that these programs should also provide some assistance to migrants who are settling out of the migrant stream, especially during the first year of transition away from being a migrant farmworker. A 24-month lookback period appears to us to be a reasonable compromise between the competing goals of targeting program benefits and providing settling-out assistance.

Steps 5 and 6 relate to eligibility, coordination, and policy. A core definition used primarily for overall population counts and macro allocation of funds could coexist with a variety of other criteria employed at these stages to determine precisely which individuals will benefit, and in what locations. Nevertheless, it may happen that experience with using a core definition will gradually make it possible to rationalize those eligibility criteria as well. In particular, we urge that coordinating bodies undertake a careful review of those criteria that result in program overlaps, particularly the question of age ranges to be served.[197]

V. Coordination at the National Level: Current Realities and Future Needs

Although the process of improving coordination among MSFW service programs properly focuses at the local level, given the diversity of other state and local services that must be considered and incorporated, there remains considerable interest in improved coordination at the national level. In chartering the National Commission on Migrant Education, Congress specifically included in the Commission's mandate a requirement that it study how:

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[197] See Part V, infra.

> migrant education, migrant health, migrant Head Start, Job Training Partnership programs serving migrants, HEP/CAMP, and adult literacy programs [can] be integrated and coordinated at both the Federal and State levels.[198]

In asking the Administrative Conference of the United States (ACUS) to conduct the present study, the Commission expanded on this request, asking that ACUS "evaluate whether an entity within the Executive Branch of the government should be created to maintain coordination and uniformity in migrant programs, and if so, how it should be structured."[199]

The balance of this report describes existing coordination "entities" and efforts, and then evaluates various possibilities for reforms or new institutions.

A. Existing Coordination Mechanisms

In recent years several efforts have provided a measure of coordination among MSFW service programs at the national level. They have evolved over time, and they are sometimes known by different names. We use here what appear to be the currently prevalent titles for the three major bodies.

1. The Interagency Committee on Migrants

Since approximately 1985, the major migrant service programs have cooperated under the framework of an umbrella committee to provide better information-sharing and coordination at the headquarters level.[200] Currently known as the Interagency Committee on Migrants, it meets quarterly, usually in Washington, D.C. The various federal agencies involved rotate responsibility for hosting and chairing the meeting and setting the agenda. The group publishes a directory setting forth the names, addresses, and phone numbers of specific individuals in the various departments who are involved with the committee, and the list is updated roughly every 6 months. The directory is useful not only for notifying interested parties of meetings, but also to help contact precisely the right office or official between meetings if an interagency issue arises.

The Committee includes among its number not only representatives from the "Big Four" service programs, but also a large number of people from other offices, both within the same Departments as those four programs (Labor,

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[198] 20 U.S.C. §2839(c)(4) (1988).

[199] National Commission on Migrant Education, Press Release (March 28, 1991).

[200] See testimony of Sonia M. Leon Reig, before the National Commission on Migrant Education, Buffalo, April 29, 1991, at 7.

HHS, Education) and from elsewhere (Agriculture, Justice, Environmental Protection Agency). Many of the offices represented are not migrant-specific or farmworker-specific, though their mandates cover farmworkers, at least in part. Examples are the Occupational Safety and Health Administration (Labor), the Food Stamp Program (Agriculture), or HHS's Office of Civil Rights. The June 1991 directory contains 68 names from these six departments or agencies, plus a half dozen "other governmental" names.[201] The level of participation in the quarterly meetings varies considerably among the offices mentioned in the directory, and some do not attend regularly.

In addition, nongovernmental organizations that are closely involved in migrant issues are also included in the directory, and are invited to attend the Committee meetings. There they are allowed to take part, although usually at the end of the presentations or discussions by the federal governmental members. These organizations include advocacy and watchdog organizations like the Migrant Legal Action Program or the Farmworker Justice Fund; umbrella organizations for the private nonprofits that are the usual grantees for the major service programs, such as the Association of Farmworker Opportunity Programs (AFOP, which represents JTPA 402 grantees), or the National Association of Community Health Centers (which represents Migrant Health clinics); and a few major nonprofits which are themselves grantees, such as the East Coast Migrant Head Start Program. The nonprofits have been pressing for a larger role and recently proposed to take responsibility for hosting and chairing a meeting, but this initiative has not yet been accepted.

The meeting agenda may be built around a specific issue of interest to several organizations, or it may center on a presentation by an invited guest, for example, someone who recently completed research bearing on migrant farmworkers. Usually it also includes some time for updating reports on recent initiatives of the major agencies that attend. Those who participate agree that the major function served by the Committee is information-sharing; it is not a policy-making body. For this reason, several people interviewed expressed frustration or impatience with it, and they noted that agencies often tend to send rather low-level personnel who cannot commit the agency but serve instead to report back to policy-level officials. Moreover, even if the lead officials of the migrant programs attend, they are sometimes hampered in assuring real policy changes for coordination purposes. As one of these officials pointed out during an interview, he is six layers below the Cabinet Secretary. Even if he and a counterpart at another agency agree that some mutual change would be beneficial, both will probably have to arrange for their two secretaries to reach agreement before action can be taken. Despite these problems, most who take part agree that on balance the Committee is useful, even if it has limited promise to generate significant program changes in the interests of coordination.[202]

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[201] Interagency Committee On Migrants, June 12, 1991 Mailing List.

2. The Farmworker Interagency Coordinating Council

Frustration at the slow pace or modest ambitions of the Interagency Committee helped spur the creation of a second coordination forum beginning in mid-1990. Led by the efforts of John Florez, then Deputy Assistant Secretary in the Employment and Training Administration at the Department of Labor, the key agencies participated in an ad hoc group that came to be known as the Farmworker Interagency Coordinating Council. This was intended to be a meeting of policymakers, at the Deputy Assistant Secretary level or higher, to focus on particular issues that require policy resolution, and specifically to look for new and creative ways, transcending agency parochialism, to serve migrant families comprehensively.[203] Members of the Council, as of April 1991, were Labor Department offices with migrant responsibilities, Migrant Head Start, Migrant Education, Migrant Health, and the Department of Agriculture.[204] Mr. Florez recently left the Department of Labor (to become Assistant Secretary in the Department of Education), before the Council had had time to demonstrate any significant fruits of its labors. It is not clear what will become of this body, although it is apparently inactive at the present time.

3. The Migrant Inter-Association Coordinating Committee and Coalition

The grantee service providers in the various MSFW service programs gained some acquaintance with one another's perspectives through their participation in the Interagency Committee. This sharing led to a proposal in 1989 that the fall quarterly meeting of AFOP, the principal organization for JTPA 402 grantees, be held at the same time and place as that of the Migrant Education program. Because this gathering was regarded as a success, the participants decided to repeat and expand the process. Planning began then for a comprehensive National Joint Conference on Migrant and Seasonal Farmworkers, to include not only JTPA and Migrant Education, but also Migrant Health and Migrant Head Start. The conference, which served as the annual meeting for all four umbrella organizations, took place in April 1991 in Buffalo.[205]

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[202] See, e.g., Mull testimony, supra note 119, at 8 ("The influence or impact that this effort [the Interagency Committee] has had is very difficult to measure, and therefore, I cannot say that these meetings have stimulated meaningful coordination of services at the state or local level. However, I do believe the real benefit has been the education that has taken place with Federal agency personnel and other participants at the national level."); Reig testimony, supra note 198, at 7 ("The Committee, in my estimation, has had limited success;" she then lists helpful initiatives, mainly in the realm of promoting better understanding and reducing isolation or fragmentation).

[203] See Testimony of John Florez to the National Commission on Migrant Education, Buffalo, April 29, 1991, at 9.

[204] Testimony of Frank Fuentes, supra note 78, at 17.

At Buffalo, some 120 panels and programs offered forums for activists, officials, and participants to discuss specific questions of mutual interest, and to learn of successful local programs elsewhere whose ideas they might want to borrow, including ideas about interagency coordination. And of course the gathering provided for an abundance of informal contacts outside the scheduled meetings. The organizing committee also wanted to award special recognition to a body or bodies that had been especially successful in promoting interagency coordination. It proceeded by agreeing on criteria in advance and then receiving and considering nominees from around the country. The award was a highlight of the proceedings. Many persons interviewed felt strongly that the joint conference and associated activities contributed importantly to interagency understanding, and they have high hopes that many concrete improvements in coordination at the state and local level will flow, incrementally, from the contacts made and ideas shared at these meetings.

Pleased with the results of the conference, the participants decided to plan for another joint meeting in 1993. The body charged with responsibility to organize that gathering was also asked to consider other initiatives that might be undertaken by the grantee community acting together. At follow-up meetings in Washington in May and in Denver in October 1991, they initiated planning for the exact structure and organization of this new "Inter-Association Coalition," and discussed other specific tasks for the organization. These may include planning smaller scale workshops for state-level personnel, improving the use of existing publications, selecting current legislative issues on which mutual strategies might be adopted, and working to include other associations in the coalition.[206] In the meantime, the planning body has taken the name of Migrant Inter-Association Coordinating Committee, consisting at present of a total of 11 persons representing the four main migrant assistance programs (ME, MH, MHS, and JTPA 402).[207]

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[205] Interview with Diane Mull, AFOP, September 17, 1991; interview with Dan Cardenas, NACHC, October 21, 1991. Federal officials were invited to participate, but they were not officially part of the organizing committee, nor did the federal government fund the Buffalo gathering. The grantee organizations deliberately decided to proceed this way, in order to allow a proper level of federal involvement but to leave the decision process to the grantee community.

[206] Migrant Inter-Association Coordinating Committee, Summary of Meeting May 23-24, 1991, Washington, DC.

4. Smaller-scale Initiatives

In addition to these more comprehensive efforts, the central offices of the various programs have entered into cooperative ad hoc arrangements over the years, sometimes enshrined in formal Memoranda of Understanding or similar documents. These tend to focus on specific areas where there is a clear and recognized benefit from close cooperation. For example, Head Start programs have always considered health screening and treatment an important component of their local services, and Migrant Head Start has logically looked to Migrant Health clinics for assistance in fulfilling this mandate, in those parts of the country where both programs are active. In 1984 Migrant Head Start entered into a 3-year interagency agreement with Migrant Health, meant to coordinate policies at the national level and to foster working relationships and joint planning among MHS and MH grantees at the local level. Although the agreement has officially lapsed, patterns of cooperation it fostered have continued, and there is some interest in renewing the formal agreement.[208]

Similarly, JTPA 402 programs can provide services for older teenagers who have difficulty in a formal school setting. This fact sets the stage for cooperation with Migrant Education programs (which tend to focus their services in the school systems). Since early 1990, the Office of Migrant Education and its service providers have been meeting with Labor's Division of Seasonal Farmworkers and its service providers to find ways to take advantage of these potential commonalities of interest. The resulting "Coordination Workgroup," which has often included participation at high levels from both departments, has developed the framework for a cooperative agreement between the two programs. The agreement would incorporate clearer policy directives to grantees, placing a high priority on local coordination.[209]

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[207] Migrant Inter-Association Coordinating Committee, Meeting Documents, Denver, Oct. 3-4, 1991.

[208] Fuentes testimony, supra note 78, at 17. Several other specific examples of interagency coordination involving MH grantees can be found in the case studies reported in the NMRP study, supra note 159.

[209] Mull testimony, supra note 119, at 7-8. There are other examples as well, such as a 1989 memorandum of understanding between the Department of Education and Agriculture's Food and Nutrition Service, providing for assistance from local ME personnel in encouraging families to obtain and keep with them the Verification of Certification card provided by the WIC program (Supplemental Food Program for Women, Infants and Children). This card helps the bearer qualify more quickly for benefits at a new location. Migrant participation in WIC increased 12

Nevertheless, many obstacles stand in the way of wider use of such agreements. First, they cannot override statutory or regulatory requirements of the specific programs, and these technical objections have sometimes delayed conclusion or implementation of agreements for lengthy periods of time. They have also sometimes led to time-consuming semantic disputes over the exact wording of the agreements. Sometimes effective implementation is also hampered because different levels of government or nongovernmental players are the grantees. For example, ME operates through state-level grantees, whereas the other programs tend to focus on local agencies or organizations. Many times it is not clear to participants that their agencies will gain enough from a formalized relationship to make it worth the trouble of negotiating such an arrangement.

B. Evaluation and the Objectives of National-Level Coordination

Although they usually express the view that coordination is improving, officials and service providers frequently voice dissatisfaction with the current arrangements for national-level coordination. To assess the adequacy of current bodies or mechanisms fully, however, requires clarity about the objectives of coordination at that level. What follows is our effort to distill the principal objectives that are implicit in the evaluations we have heard, or that seem appropriate to add to the list.

1. Information-sharing

The most basic starting point for coordination is sharing of information, so that participants in one program have a better idea of the operations and statutory framework of the other programs, as well as the services they provide and the legislative or programmatic issues they are now facing. This was apparently a central interest of the congressional committee that first proposed chartering the National Commission on Migrant Education. In explaining the tasks of the Commission, the committee suggested that it explore a "National Center for Migrant Affairs to help coordinate and disseminate information pertinent to migrants."[210]

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percent from 1989 to 1990, and a WIC official credits much of this improvement to the interagency cooperation. Testimony of Robert Mulvey, National Commission on Migrant Education, Buffalo, April 29, 1991.

[210] H.R. Rep. No. 100-95, 100th Cong., 1st Sess., at 38-39 (1987). The statute specifically charges the Commission with responsibility to consider such a Center. 20 U.S.C. §2839(c)(12) (1988).

This objective is uncontroversial, and it is the one that existing arrangements principally serve. Although the federal government now lacks the single central depository for migrant-related studies and information that was apparently contemplated in the proposal for a National Center (to be discussed below), numerous depositories with narrower focus exist, and in any event the interagency and interassociation mechanisms mentioned above accomplish a considerable amount of information sharing. That the function might be done more systematically is certainly possible, but any efforts toward that end should build on an understanding of the other objectives of coordination.

2. Wise Use of Limited Resources

a. Geographic Targeting

MSFW-specific service programs have insufficient resources to serve the entire target population. Thus programs should be located where the highest concentrations of migrant and seasonal farmworkers can be found. Each individual program has substantial internal incentives to follow this common-sense dictate, and in general, existing programs have conformed to this requirement as they first let contracts or awarded grants and then expanded. The problem is that farmwork patterns change, sometimes quite rapidly. Labor-intensive crops in one area may be replaced by others that can be harvested mechanically, or, alternatively, a large agricultural company may start up a major new labor-intensive operation employing thousands of migrants in an area where such workers were previously unknown. The concern that services keep pace with changes in agriculture also figured in Congress' decision to establish the National Commission,[211] and was frequently voiced by officials and service providers in our interviews.

The present service infrastructure is not well equipped to adjust to these changes. Officials in every program interviewed noted their program's deficiencies in this regard.[212] Although central grant administrators may cut an established grantee's funding at the next renewal if the grant proposal shows reduced "productivity" or otherwise discloses a decreasing population of eligible recipients, they are not well positioned to spot wholly new areas of migrant activity. Particularly because their budgets (with the exception, recently, of Migrant Head Start) have been relatively level for some time, the agencies have had little capacity to entertain applications for new centers or clinics in previously unserved areas.

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[211] H.R. Rep. 100-95, at 37: "Among other things, the Commission will examine the changing demographics of the migrant student population in an effort to assure that the patterns of migrancy are anticipated and the children are served to the best extent possible."

[212] The question arises in somewhat different fashion for Migrant Education, which deals principally with state-level governmental agencies, who are then responsible for using the resources provided to the state in a way that maximizes their effectiveness. The problem of geographic targeting still arises (and the ultimate effectiveness of the programs would still be greatly aided by better systems for reliable MSFW population data), but the responsibility for adjusting program falls mainly on state program officials, not federal officials.

Targeting could of course be improved without interagency coordination, but tracking geographic shifts in farmworker activity on a joint basis and responding accordingly presents many advantages. Improvements in quarterly or annual farmworker census figures, as discussed in Part IV of this report, would facilitate timely program adjustments of the kind envisioned here, and would also make it easier for a central administrator to feel more confident about cutting or eliminating programs in certain areas where productivity has declined (if it can be shown that this is related to a long-term reduction in farmworker population). Detailed data of this kind, with frequent updates, are expensive to gather. It makes sense to pool resources to provide for the most effective single counting process possible.

Even without such improved data, however, the present coordination entities serve the objective of geographic targeting only marginally and incidentally. It is possible that their meetings provide occasions for, say, Migrant Health to learn of a substantial migrant population in a new area, because they hear of substantial new Migrant Education activity there. But the information-sharing provided by current bodies relates primarily to programs in existing locations; they incorporate no systematic effort to use the meetings as a basis for these sorts of geographic adjustments. Many service providers and officials interviewed expressed a wish for more systematic information about shifting agricultural labor patterns, so that they could adjust programs accordingly.

b. Minimizing Overlap and Promoting Efficiency

It is clear from preceding sections that the potential for overlap or duplication among the programs exists, particularly with regard to repetitious intake processing and outreach. As discussed above, this problem can be minimized greatly through local cooperation, but many localities, for a variety of reasons (inattention, personality conflicts, inertia), have simply been unable to work out the necessary arrangements.

The potential for overlap has also expanded in recent years, as statutes or regulations have authorized service providers to reach wider populations--for example, by expanding the respective age ranges of the programs. Migrant Education now has authority to count and to serve children and youth from age

3 up, and the Department of Labor has been urged to allow its §402 grantees to engage in "employability enhancement" services that reach children below its traditional limit of age 14. Coordination would seem to be useful to resist the internal pressures for such expansion, or at least to review more systematically, before any such change becomes a *fait accompli*, whether the program objectives that drive such an amendment could actually be served more effectively through program adjustments in another agency that already reaches migrant children in the affected age bracket.

Such changes in program scope are not normally presented to the interagency forums beforehand[213] (although the changes may be the subject of information-sharing after the fact), in part because those forums have no policy-making authority on such matters. Such advance checking would be desirable, but participants often worry that it would only trigger negative reactions based on "turfism." Nevertheless, coordination would be better served by some such review. Indeed, interagency bodies ideally would not only review proposed expansions of a particular program's authority, but also should look systematically at existing overlaps and think creatively about ways to serve the target population more efficiently. Such scrutiny need not always mean selecting one agency over the other as the exclusive provider--competition or complementarity may be worthwhile in some circumstances, depending on the task and the geographic area[214]--but any such overlap should be chosen as the result of careful consideration of a wider range of issues, rather than left to proliferate as a result of a dynamic that seems internal to each program, without close attention to effects elsewhere.

Ideally, government coordination mechanisms should also have the capacity to ask larger questions. Of the approximately $500 million that now goes into migrant service programs, some 60 percent goes to Migrant Education. Is this a sensible way to allocate limited resources? What are the relative priorities of the various services in maximizing the welfare of the target population? It may well be that ME deserves exactly this sort of priority, but under the present arrangements these comparative questions are never expressly asked and answered. There is no forum that effectively looks at such budgetary priorities. We were surprised to learn in the course of our interviewing that even the Office of Management and Budget (OMB) is not organized so as to ask questions of this kind. OMB scrutiny of migrant programs is divided departmentally, with different staff specialists overseeing the respective MSFW service programs. No single officer in OMB (or elsewhere in the executive office) takes a look at the whole MSFW service program landscape, so as to watch for opportunities to make better use of overall resources in meeting the comprehensive needs of farmworker families.[215]

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[213] Diane Mull, Executive Director of AFOP, testified: "In some cases, the overlap in program's age ranges is not a complication due to the different scope of services being offered by each program [but potential] for complications is created when changes occur without consulting other affected service providers. ... [D]iscussions and hearings, like those being held today, should take place before such changes are implemented." Mull testimony, supra note 119, at 2.

[214] See generally Landau, *Redundancy, Rationality, and the Problem of Duplication and Overlap*, 29 PUB. ADMIN. REV. 346 (1969).

Many service providers and officials objected to our laying too much stress on the objective of reducing or eliminating overlaps or otherwise pruning or reorganizing programs in the service of a supposed efficiency. Although they could not quarrel with these objectives in the abstract, they worried greatly about what they would mean in practice. They fear that prominent discussion of overlaps in authority will be used as a pretext for serious budget cutbacks in one agency, without any guarantee that the funds will go to another agency that should assist those people who lose the service from the first. "Outsiders," in other words, might be too ready to seize on such information to undercut programs they have never supported, and "wasteful duplication" is an easy rallying cry that often simply masks misunderstanding of the real tasks involved.[216]

Others we interviewed pointed out vigorously that the overlaps themselves are far more theoretical than real. All MSFW service agencies serve only a fraction of the eligible population. Overlap in authority simply means that some of those left out of one program for lack of resources have a chance for similar services through another. (Migrants who arrive in an area after a MHS center has already reached its enrollment limit, for example, may be able to secure some help towards providing child care through ME resources or through the support services component of JTPA.) Overlap, these persons suggest, will not be a real problem until all agencies are funded at a level that permits services for virtually all of their target populations. In any event, they argue, a degree of overlap can actually be of benefit, for it allows experimentation with different approaches, rather than a stifling uniformity.[217]

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[215] This situation differs from, e.g., the review of refugee programs in the days before creation of the office of the U.S. Coordinator for Refugee Affairs. At that time, refugee resettlement programs involved the State Department's Office of Refugee and Migration Affairs, the Justice Department's Immigration and Naturalization Service, and HEW's Office of Refugee Resettlement. OMB officials frequently convened meetings of officers from all three departments to consider relative priorities, to examine ways in which one agency's decisions affected the budget of the others, and occasionally to decide whether a function could be more efficiently handled by another.

[216] See J.Wilson, Bureaucracy: What Government Agencies Do and Why They Do It 265 (1989).

[217] See Landau, supra note 212, at 354-56.

These reservations deserve serious attention. Overlap in authority does not necessarily mean actual duplication or wasteful spending, particularly at the present level of funding. Moreover, glib talk about efficiency sometimes does mask efforts to gut a program. Nevertheless, we believe that these concerns should be heard more as cautionary notes, to be met by fuller airing of both the pros and cons of particular proposals to reduce overlap or reconsider funding priorities. They do not overcome the desirability of more serious and comprehensive attention to issues of efficiency and potential duplication of effort, particularly with regard to the two issues identified above--the burden of duplicative outreach or intake procedures, and the dynamic of incremental expansion in individual service jurisdictions. At present, decisions about funding and siting of programs, or other expansions of authority, are made separately by the different federal agencies, in processes that are principally responsive to the grantee constituencies of that program. It would be far better to have some forum for examining the overall service package in a given area, in a way that takes full account of the ultimate objectives for service to the MSFW population--without ignoring, of course, the risk of pretextual cuts that so worries the agencies.

Viewed in this light, current coordination entities are not well-designed to serve these efficiency objectives. They function as a product of comity among agencies or organizations, and none are mandated by statute, regulation, or executive order. Comity could be significantly threatened by proposals, for example, to transfer nearly all outreach staff to a single program so as to consolidate intake processing. It is similarly endangered if one agency begins asking persistent questions about another agency's program expansions, and even more so if the first aggressively suggests shrinkage in the scope of a second agency's mandate on the ground that the first can serve a certain population or meet a particular need more effectively. The present interagency bodies, dependent as they are on continuing goodwill of the participating agencies and lacking any legal requirement that such agencies continue their participation, are unlikely ever to provide a good forum for asking these kinds of tough questions.

c. Provision of Comprehensive Services

Most of the agencies that serve MSFWs, and particularly those with an educational focus, recognize the need for comprehensive services if their own objectives are to be fully realized. Only if children are well-nourished and healthy, for example, can they take maximum advantage of their schooling. Workers cannot be steady participants in a job training program if their child-care arrangements are unreliable. Education on good hygiene may be highly useful in preventing future illnesses or injuries and thus minimizing the need for treatment in a migrant clinic. Precisely because of this recognition, most of the agencies have authority to spend some of their funds on ancillary or supportive services. Sometimes these authorities are flexible enough to allow the agencies to fill gaps in the overall program landscape, by providing needed services that are not the specific target of any of the service programs. (An example is transportation services, which can be provided as nontraining related support services by JTPA grantees,[218] or, in some circumstances, by ME or MHS.) According to their statutory or regulatory requirements, most are to use their funds for these purposes only after it is determined that no outside agencies can provide the service. This is a difficult mandate to realize in practice, however, even though grantees are required to discuss in their grant applications the general steps they are taking toward these ends.

In addition to this concern for filling gaps in service provision, interest has been renewed in transcending traditional agency boundaries in order to consider and address the needs of migrant families as a whole, perhaps through a case management approach that would give the family a single point of contact within the service provider bureaucracy in any local area.[219] This impulse played an important role in inspiring the establishment in 1990 of the Interagency Coordinating Council.[220] That Council did not remain active long enough to know how effective it might be toward that end. But even if revived in the same form, it is likely to run into many of the same problems discussed in the previous section on efficiency. Lacking ultimate decisionmaking authority, or even a foundation in statute or executive order that mandates continuing participation by affected agencies, the Council too is dependent on persuasion and goodwill to have its suggestions implemented, and indeed to continue functioning at all. The agency-focused, task-specific outlook of the participants thus imposes a barrier to implementation of any agency-transcending ideas that body might generate. It does not have independent authority to initiate even limited pilot projects meant to demonstrate the possibilities for comprehensive approaches.

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[218] 20 CFR §633.304(b)(2), (c)(4) (1990).

[219] This objective has been articulated since at least the days when migrant programs were operated by the Office of Economic Opportunity (see S. Levitan, The Great Society's Poor Law: A New Approach to Poverty 250 (1969) (quoting OEO planning document)), but it has always been imperfectly realized. Moreover, the impulse to provide comprehensive services to families, with a minimum of bureaucratic confusion, is finding expression on many fronts, and Congress has authorized various pilot projects. If these result in promising new initiatives, migrant programs should of course employ the new approaches. See, e.g., 56 Fed. Reg. 29,656 (1991) (HHS request for proposals to establish a National Service Integration Resource Center and announcement of funding for up to six local or regional facilitators for comprehensive integration).

[220] See generally Florez testimony, supra note 201.

3. Summary: What Is Needed in the Ideal Coordinating Entity

Harold Seidman has described the quest for coordination as the "twentieth century equivalent of the medieval search for the philosopher's stone. . . . If only we can find the right formula for coordination, we can reconcile the irreconcilable, harmonize competing and wholly divergent interests, overcome irrationalities in our government structures and make hard policy choices to which no one will dissent."[221] Coordination is always attractive in the abstract, yet often painful and difficult in the concrete. The relatively widespread support for coordination among migrant service agencies suggests an equally rosy view of what coordination will accomplish. This is coupled with a tendency to downplay the painful adjustments, including some loss of control, occasional ceding of program responsibilities, or transfer of funding, that complete coordination is likely to entail for at least some of the individual agencies involved. This view may explain why much of the concrete discussion to date focuses on relatively painless issues like better information-sharing or highly technical matters like definitional discontinuities. Definitional differences become a form of excuse, affording an explanation for the failure to take the considerable time required or to make the hard decisions that may be necessary to adjust programs so as to achieve real efficiencies or to better serve the overall needs of migrant families.

The foregoing discussion suggests that a future interagency coordination entity needs above all to be able to ask creative, persistent, and tough questions about the allocation of responsibilities and the ways in which ultimate service objectives (which transcend agency boundaries) are or are not being served. This need not mean, necessarily, that major changes in program operations are in the offing. It does mean that more careful scrutiny, from a perspective not tied solely to one agency and its constituencies, would be applied--initially to examine proposed changes or expansions in mandate, and eventually to review existing programs. At least temporary disruptions in agency comity must be possible without terminating the coordination endeavor, although effective coordination over the long run will of course require skill and tact to move beyond such challenging periods with a minimum of lingering bad feeling.

Second, the coordinating entity needs the capacity to engage the attention of the appropriate policy-making officials in the affected agencies, sometimes up to the level of the Cabinet Secretary.[222] If matters cannot be resolved through such channels, the coordinating entity needs the capacity to assure ultimate interagency resolution, if necessary (when the issues are of a scope to warrant this) by means of Presidential choice among competing options.

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[221] H. Seidman & R. Gilmour, Politics, Position, and Power 219 (4th ed. 1986).

[222] This conclusion assumes, of course, that MSFW service programs continue to be based in separate departments. We expect this to be the case, but we discuss in Part VI an option for total consolidation.

Third, the entity should also pay attention to ongoing information sharing, and should initiate improvements where possible at reasonable cost. This objective, however, is closer to adequate realization under the present system than are the previous aims.

Fourth, the entity should assume a function related to the preceding: it should oversee a process leading to the development of better statistical systems, as discussed in Part IV above, so as to provide agencies with agreed and reliable information on MSFW populations, and especially on changes in farmwork and in farmworker population patterns.

Fifth, a federal coordinating entity would be the logical focal point for efforts to promote coordination at the state and local levels. It could be the central decisionmaker in choosing award recipients or providing other recognition for successful local coordination efforts. It should also work to devise other incentives to promote these ends.

Sixth, the coordinating entity should also take the lead in examining possibilities for harmonizing definitions, if only for purposes of establishing a "core definition" to be used in census counts, as discussed in Part IV. Over time, it may also find ways to harmonize program definitions or other eligibility qualifications.

VI. Coordination at the National Level: Alternative Models

We have not found the philosopher's stone. No one proposal or set of proposals for coordination clearly recommends itself as superior to all others, particularly since a near-infinite spectrum of variations and permutations can be imagined. We have tried to avoid overdoing such detail; instead we cluster the ideas around four possible models. The first is the most modest, addressing only the improvement of access to information (not a priority need at present). It could be implemented in conjunction with any of the other three, more comprehensive, options.

A. A Unified Information Clearinghouse: The National Center for Migrant Affairs

There have been recurring proposals for creating a central clearinghouse for information on migrant programs, as a way of improving the information-sharing function that is necessary to better coordination. As noted above, this idea received concrete expression in the legislation that created the National Commission on Migrant Education. The statute requires the Commission to consider whether there is "a need to establish a National Center for Migrant Affairs and what are the options for funding such a center."[223] The legislative history describes the purpose of such a proposed center as "to help coordinate and disseminate information pertinent to migrants," making specific reference to a consultant's study that urged consideration of a central repository for "products" generated by the coordination grants of the Migrant Education Program (now known as §1203 grants).[224]

We encountered no substantial objections to the proposal for a National Center. To the extent that it is simply an information clearinghouse, it steps on no one's programmatic toes, at least in the absence of specific plans for funding it. But we found little enthusiasm for the idea either. The specific concerns of the consultant's study referred to in the House report, which focuses on Migrant Education "products," have been met by the more complete development of three Program Coordination Centers (PCCs), one for each of the western, central, and eastern migrant streams, under the umbrella of the Migrant Education Program. As discussed in Part II, the PCCs, in addition to other functions, serve as repositories for the products of previous §1203 grants, which can be drawn upon by any interested user.[225]

Many other existing resource centers also can be consulted by those who seek further specific "products" associated with the education of migrant children or the other migrant services. For example, the Department of Education maintains an elaborate and technologically advanced system of resource centers as part of its ERIC system (Educational Resources Information Centers). The staff of the 16 subject-specific ERIC clearinghouses, operated under contract with the Department, review the documents and journals they receive, abstract and index those that are relevant to their center's subject matter, and respond to inquiries from teachers, parents, students, and researchers. ERIC produces monthly hard-copy indexes and quarterly CD-ROM directories, and all the indexed documents can be consulted in microfiche form at any of some 900 depositories throughout the United States and in numerous foreign countries.[226] One of the 16 centers, known as CRESS (Clearinghouse on Rural Education and Small Schools), includes migrants within its coverage, but documents on migrants give rise to only a small fraction of its activities.[227]

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[223] 20 U.S.C. §2839(c)(12) (1988), enacted by Pub. L. No. 100-297, §1001, 102 Stat. 193 (1988).

[224] H.R. Rep. No. 100-95, 100th Cong., 1st Sess., at 39 (1987). The consultant's study, as described by the House committee report, noted the absence of a "central repository . . . for products associated with the Section 143 grants (coordination of migrant activities) programs." In this respect, the suggestion in the statute, for an overarching center for migrant affairs, goes considerably beyond what the study seemed to have in mind. Section 143 is now referred to as §1203, 20 U.S.C. §2783 (1988), but the substance is not substantially changed; the provision focuses on interstate and intrastate coordination within Migrant Education--i.e., among ME agencies at the tate and local level. Moreover, the full study points out that such products tend to deal less with coordination as such and more with development of curriculum guides, staff training packages, and similar items--all items fairly specific to ME and probably not of major interest to other MSFW service organizations. N. Adelman & C. Cleland, Descriptive Study of the Migrant Education Section 143 Interstate and Intrastate Coordination Program 41-45 (Policy Studies Associates, Inc., March 1987).

[225] Interview with Saundra Bryant, Office of Migrant Education, Washington, DC, October 21, 1991.

Other migrant programs have their own associated resource centers or clearinghouses. For example, Migrant Health funds the National Migrant Resource Program in Austin, Texas, which provides services similar to ERIC's for migrant health issues. Migrant Health clinics make use of its database and library, as well as the other specific products (such as medical protocols) it generates. Migrant Head Start agencies and staff similarly draw upon the services of the Migrant Head Start Resource Center in Tysons Corner, Virginia.

With all these repositories in existence, it is hard to develop a persuasive case for adding still another. The problem is not the lack of centers capable of disseminating available information on migrant service programs.[228] The problem is more the disconnection between the existing repositories and the field-level service providers. Although the latter might well benefit from learning of relevant studies or accounts of strategies devised elsewhere to overcome problems similar to ones they are now facing, few local service providers have the time to engage in this kind of research and reading. Further consolidation of migrant-related information into a single National Center is unlikely to ease this situation. If wider or more effective use of such

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[226] Interview with Robert Stonehill and Pat Coulter, ERIC offices, Washington, DC, October 22, 1991; A Pocket Guide to ERIC (April 1991); ERIC Annual Report 1991; Directory of ERIC Information Service Providers (Jan. 1990). ERIC received an appropriation of $6.6 million in FY 1990.

[227] CRESS, Annual Review Report 14 (Jan. 31, 1991) (documents relating to migrants provided only 1.1% of CRESS input in RIE database for 1990).

[228] A recent auditor's inquiry at the Department of Education revealed that that Department alone has over 700 clearinghouses of some kind (including technical assistance centers). This revelation has generated considerable interest in both the executive and legislative branches in cutting back and consolidating; creation of a new national repository would have to swim against an understandably strong tide running in the opposite direction. Interview with Patrick Hogan, Office of Migrant Education, Washington, October 22, 1991.

"products" is deemed a priority, any extra funding might well be better used instead to beef up the staffs at the local level, in the hope that some of the extra staff time might be devoted to drawing upon such accumulated learning.[229]

We recommend that any effort to create a National Center for Migrant Affairs not start from scratch. It should instead build on the existing foundation of current documentation and research centers. Most promising (and least expensive) would be some form of loose linkage among existing clearinghouses under a National Center's umbrella, without greatly disturbing their present operation. The National Center would then focus its efforts on publicizing the resources available, easing the use of such resources by local service providers, and perhaps providing a central telephone exchange which would refer inquirers to the appropriate clearinghouse. It should be a modest undertaking. Care should be taken to avoid duplicating existing resources or draining funds from other direct services.

B. A Separate Department or Agency Unifying All Migrant Service Programs

One can envision the creation of a single Migrant Affairs Department that would unify all migrant service functions. A model for such unification might be found in the creation of the Department of Energy in 1977. That reorganization was advocated, in significant part, on the ground that it would provide for better coordination among programs that had resided in separate agencies theretofore.[230] The new department combined functions that had previously been performed by five separate departments and four independent agencies.[231]

A new Department of Migrant Affairs could incorporate the Big Four programs along with others such as migrant housing from Agriculture, and possibly even the authority to serve MSFWs now carried by general programs like Food Stamps or WIC. (It is possible also, in the interest of true comprehensiveness, to envision an agency that would also eventually incorporate enforcement functions like those established by the Migrant and Seasonal Agricultural Workers Protection Act.[232]) Coordination among programs would still be required, but it would become an intra-agency task, and could more readily command attention at the policy-making level. The process of preparing the agency's annual budget, plus defending it as a whole before OMB and the Congress, would provide built-in occasions for asking many of the comparative questions mentioned above. Beyond the discipline necessarily imposed by the budget process within a single department, a departmental policy planning bureau might assume ongoing responsibility for asking tough questions about overlaps and efficiency, with authority to report its suggestions directly to the Secretary, along with comments by the affected programs.

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[229] The consultant's study to which the House Report refers itself discussed these and other centralized databases, but noted that many are badly underutilized. Adelman & Cleland, supra note 222, at 51. It also reported the comments of two state ME directors that perhaps a "saturation point" had been reached on "products" of the section 143 grant programs. Id. at 61. The study's ultimate suggestion for still another repository, id. at 62, is thus at least mildly surprising.

[230] Pub. L. No. 95-91, 91 Stat. 565 (1977).

[231] See 1977 Cong.Q. Almanac 612.

Governors and local officials would know where to concentrate their efforts if they want to lobby to reduce certain duplicative procedures. In addition, a unified department of this type could ultimately develop a unified grant process, inviting combined proposals by a single service provider for each local area or region that would incorporate all the components now handled separately--e.g., education, job training, nutrition, child care and child development, health services, housing, etc.[233] Applications could be judged as to how well they mix and match the various components so as best to meet the comprehensive needs of migrant families in the local area, in light of the local or state resources, public and private, already available.

Obvious obstacles stand in the way of realizing this proposal in practice, and not even those who have been most supportive of ambitious coordination efforts or of consistent Cabinet-level attention to migrant issues have seriously advanced the idea of a new Department of this kind. One initial objection derives from size and relative political priority. Migrant service programs now claim a combined budget of something over one-half billion dollars, whereas the Department of Energy receives $14 billion (and also touches on issues that doubtless have wider political ramifications).[234]

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[232] 29 U.S.C. §1800 et seq. (1988).

[233] A few local service providers exemplify this approach already, at least in part. But as the description in Part III, supra, of the Iowa experience reveals, such unification still requires cumbersome multiple applications to separate funding agencies, and each of those agencies, at present, tends to insist upon clearly identifiable separate programs even when run by a common grantee. Such demands are less likely if there is complete unification at the federal level within a single department or agency. Migrant Education is harder to work into this framework, because its services are traditionally provided through public agencies, i.e., the school systems. This obstacle is not necessarily insuperable, however, for public bodies sometimes become MHS grantees or delegate agencies, and similar adaptations might conceivably allow a broader role for recipients of ME funds, if they wished to branch out.

[234] See 1989 Cong.Q. Almanac 738.

Unification of all MSFW service programs could still be accomplished in other ways, even if a new Department is deemed inappropriate. The Migrant Affairs body could instead be set up as a nonCabinet agency, something like the Small Business Administration.[235] Alternatively, the unified body could be designated a bureau, headed by an Assistant Secretary, and located within one of the existing departments, although it is by no means clear which department should be awarded such functions.[236] These modifications would create a structure more proportionate to the scope of MSFW service programs, but either one would generate considerable political controversy over the exact institutional arrangements or the precise forms of accountability to President and Congress.[237]

A more fundamental objection to this sort of unification is the following: what might be gained in coordination among migrant-specific programs would be outweighed by the losses to effective coordination with other related governmental functions.[238] Migrant Health, for example, would have to find new ways to assure interagency coordination with other public health programs, including Community Health Centers, and Migrant Head Start would probably need to coordinate, now across agency boundaries, with the basic Head Start program. These needs could require massive readjustments. Furthermore, some people we interviewed saw the current departmental locations of these programs as a form of mainstreaming, helping to minimize the isolation or stereotyping that sometimes befalls the programs' clientele. Finally, consolidation into one agency might make all the programs more vulnerable at budget time.

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[235] See 15 U.S.C. §631 et seq. (1988).

[236] A proposal of this type appeared in a bill sponsored by Congressman Roybal in 1974, which would have created a National Office for Migrant and Seasonal Farmworkers in the Department of Health, Education and Welfare. All MSFW programs within HEW's jurisdiction would have been transferred to this office, and its work would have been supplemented by a special task force as a kind of advisory committee charged to carry out continuing studies of the needs of MSFWs and of "methods for meeting those needs." See National Office for Migrant and Seasonal Farmworkers, Hearing on H.R. 12257 before the Subcomm. on Agricultural Labor, House Comm. on Education and Labor, 93d Cong., 2d Sess. (Sept. 26, 1974).

[237] If a separate agency, it could be located within the executive branch (clearly the preferred option, given the functions it must perform) or it could be set up as an independent agency headed by a commissioner who could only be removed for cause. See generally Humphrey's Executor v. United States, 295 U.S. 602 (1935); Parker, The Removal Power of the President and Independent Administrative Agencies, 36 Ind. L.J. 63 (1960).

[238] For a stimulating argument that hierarchical reorganization is often inferior to informal coordination of "loosely coupled multiorganizational systems," see D. Chisholm, Coordination without Hierarchy: Informal Structures in Multiorganizational Systems 1-19 (1989).

The point need not be labored. Gains in efficiency and coordination under this model would probably be overshadowed by these other disadvantages. Complete unification is not a practical option. Instead it might be viewed largely as an ideal type, illustrating the maximum effort that might be made if efficiency and coordination (or more accurately, integration) assumed the highest priority. It provides a kind of lodestar that might illuminate other options that are more realistic in the medium term.

C. Improved Interagency Council

Interagency committees and councils are often used for coordination, but they can hardly claim to have gained popularity or even respect. Seidman summed up common attitudes in referring to them as "the crabgrass in the garden of government. Nobody wants them, but everyone has them. Committees seem to thrive on scorn and ridicule."[239] President Carter particularly targeted such committees as part of his effort to streamline and rationalize the organization of the federal government. But he too found that he could not live without them, creating at least seven new councils in one 12-month period, including an Interagency Coordinating Council to deal with urban and regional policy, an Energy Coordinating Committee, a Management Improvement Council, and a Consumer Affairs Council.[240] Despite their nominal unpopularity, interagency councils obviously meet real needs, particularly when other considerations preclude full integration of the programs involved.[241]

Coordination among the MSFW programs could therefore be improved by strengthening or redesigning the current committees or councils, leaving the basic responsibilities for programs in the various departments, under the ultimate responsibility of the respective Cabinet secretaries. To make this approach successful, careful changes in the coordinating bodies would be needed, however, to overcome the deficiencies noted earlier. Changes should address the following objectives: to give the body or bodies higher standing, to assure more complete involvement by officials with policy-making authority, to provide the coordinating entities both the capacity and the incentives to look closely at proposed improvements even if the proposals provoke resistance on the part of one or more of the participating agencies, and to equip them with the ability to force decisions by agency or department heads when a proposal has been sufficiently refined and deserves a straightforward decision.

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[239] Seidman & Gilmour, supra note 219, at 226.

[240] Schick, The Coordination Option, in Federal Reorganization: What Have We Learned? at 85, 95-96 (P. Szanton ed. 1981).

[241] Schick, id. at 86-88, identifies three main reasons why coordination is needed: planned or preferred redundancy, a pluralism of affected interests, and a lack of integrating criteria.

These objectives are rather easy to list. Mechanisms or procedures for accomplishing them are far harder to craft, because in the end their successful achievement may depend much more on political support or substantive priorities than they do on procedural fixes.[242] In fact, the current mechanisms could be made to work for these purposes, without much procedural or structural tinkering, if, say, the Secretary or Deputy Secretary of one of the Departments involved began to take substantial personal interest in migrant programs generally or in some specific coordination initiative (such as consolidated outreach and intake processing). Similar results might be made to flow from the present structure if the President or a key White House staffer placed equivalent priority on the same matters. What is needed, in short, is someone in a position of sufficient prominence who would press the matter, demand high-level attention in counterpart agencies, spend a fair amount of personal time (a precious and scarce commodity) and political capital, and ultimately refuse to let the issue drop until some resolution is reached--either implementation or agreed abandonment of the initiative.

Such a scenario is unlikely in the near term, in view of the host of other issues, with higher political salience, that compete for attention of those high-level officials who could energize the existing coordination mechanisms. Procedural or structural changes cannot by themselves provide this sort of impetus. The best they can do is improve the odds that a high-level figure might choose a migrant or farmworker issue for priority attention because he or she knows that there exists a workable forum for refining ideas, implementing change, and eventually (if the changes work out as expected) pointing to concrete achievement.

With these cautions in mind, structural suggestions can be offered that might provide some progress, without displacing the ultimate authorities of the department heads. First, a more solid and enduring basis for the interagency mechanism would help give it higher stature. Some officials and service providers offered in their interviews preliminary ideas for grounding the mechanism in statute or Executive Order. Such a chartering instrument would give the entity authority and a mission transcending the temporary acceptance or acquiescence of agency or department heads. Its drafting would also force all participants to give close thought to just what kind of a body might be most useful.

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[242] As Schick has observed, id. at 96-97:

> The effectiveness of an interagency committee depends less on its formal status than on the extent to which member agencies share common interests and perspectives. . . . Interagency committees cannot succeed as organizational orphans. When nobody has a vested interest in the group's work and nobody is responsible for following through on its decisions, a committee will languish even if its formal status remains intact. This problem cannot be overcome merely by arming one of the group's members with "convenor" or "lead" status. The lead agency has to care enough to invest the group with resources and support.

We recommend, if this option be pursued, that the charter provide for a coordinating entity built generally on the model of the Interagency Coordinating Council, rather than the Interagency Committee on Migrants. The former is a smaller body, meant to pull together a few key people with policy authority for actual decisions on changes in operation. Its smaller size should promote focused dialogue on such issues rather than having the function degrade into mere information-sharing. The instrument should specify exactly which officers would be the members of the Council from the various participating agencies. In general, they should hold the rank of Deputy Assistant Secretary or above; perhaps a higher rank would be appropriate. Designation in statute or executive order of the officers who are to be members cannot, of course, guarantee attendance by the principal rather than a delegate. But express designation does provide a fulcrum for pressure by the chair if one of the named officials is too often absent.[243]

It might also be useful for the charter to tap specific officers (by position, not name), from the departments most heavily involved, as chair and deputy chair, in order to assure consistency and continuity. Such a permanent assignment, however, may prove too rigid. It would in any event be highly contentious, perhaps leaving those agencies not chosen suspicious about the new body from the start. If so, a rotating chairmanship may become necessary, but the rotations should be widely spaced, at intervals of no less than 2 years, to allow for both some sense of "ownership" in initiatives generated during the period and enough continuity to see many of them through to completion during one agency's chairmanship. This arrangement would also help assure that Council initiatives would be adequately staffed. Realistically the chairing agency will have to staff the process any time others cannot be persuaded to take the lead in preparing reports or otherwise supporting an initiative.[244] Finally, a relatively long-term chair may be in a better position to press other agencies at the highest levels, to assure that they take some action on well-formed proposals and not simply let matters drift in the hopes that proponents will lose interest.

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[243] Designating positions filled by political appointees as the members of the council poses a risk of discontinuity, given the more frequent turnover in such positions. We therefore heard some suggestions for designating further members of the council drawn from the ranks of career civil service personnel. Such a move appears inadvisable. The council is likely to work more cohesively as a relatively small body. Continuity is clearly important, but if the council's functions assume any level of real importance, the policy-making officials will want to involve career officers in the body's ongoing actions, if only to prepare the member adequately for issues to be discussed at the meetings. The realities of time management also suggest that top civil servants are likely to attend some of the gatherings anyway as stand-ins for designated members.

The chartering instrument should require advance review by the Council of any significant MSFW service program changes (such as amended regulations or substantial alteration in grantee performance standards) well before their adoption. Adoption would still be within the authority of the originating department, but the Council might well offer an interagency perspective that would otherwise be lacking in the internal deliberations. Sometimes, as mentioned above, this perspective could be expected to help counter certain expansionist tendencies internal to the separate programs. The charter should also assign some sort of comprehensive budget review authority to the Council, to provide a forum for considering comparative effectiveness and deciding whether there should perhaps be a different assignment of resources.[245] Obviously all of these review functions will need to be handled in close cooperation with the Office of Management and Budget. In this connection (indeed, under any conceivable coordination option), OMB should also designate a single office or staff specialist to provide comprehensive budget and regulatory review of all MSFW programs.

Coordination of this type is most likely to be successful when focused on specific tasks. The council could come up with its own agenda under very general terms set forth in its charter, of course. But it is probably better if the chartering instrument itself assigned the council not only the general mandate of coordination but also a few such specific assignments, which would then come with the imprimatur and mandate of Congress or the President. Such an assignment would help build momentum, from the earliest days, for an active agenda for the new coordinating entity. Also, if the body has a specific duty to come up with a definite product in the form of new regulations or other program instruments, all affected agencies will have a definite incentive to remain engaged in the process at a fairly high level, if only to protect the agency's own interests.

The most promising early tasks we have identified (ones that need not have terribly threatening short-term programmatic consequences for any of the participating agencies) are discussed above: development of a core definition and detailed plans for improved MSFW census information, creation of a consolidated intake form and a streamlined outreach procedure, and possible local pilot programs allowing cross-eligibility or definitional waivers. The chairing agency can be expected to take the lead on many of the council's projects, but on some issues it may make sense for another agency with a greater stake to be designated as lead agency. In any case, the clear assignment to one of the participating agencies of responsibility for a concrete action outcome, to be reached after consultation with the other agencies, appears most promising for sustaining attention and involvement.[246]

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[244] Conceivably the Council could be given its own modest staff, but such an approach risks heightening imbalances and sharpening possible resentments on the part of agencies not currently chairing the body.

[245] This is bound to be a sensitive subject, however. A council of equals, such as this option envisions, is not an auspicious forum for assuring close review of such questions; the process is potentially too threatening to all of the players involved.

The Interagency Committee on Migrants need not be displaced under this model. By and large, it meets a different need: providing a forum for quarterly information sharing and notification, involving a larger number of operational level staff. Similarly the Interassociation Committee could continue to meet the distinct coordination needs of the grantees of the various agencies. When either of these bodies generates concrete proposals for coordination or altered functioning, the proposal could go to the Council for further consideration and for ultimate implementation.

This option, creating a strengthened interagency council as the principal federal coordination entity, holds certain advantages. It would be relatively inexpensive, and it could be established without major disruptions in familiar agency operations. Some initial wrangling could be expected over the exact provisions of any new statute or executive order, but the chartering instrument could probably be drafted (particularly with a rotating chairmanship) so as to avoid deep disaffection in any quarter early in the process.

The disadvantages are straightforward. Despite any structural improvements that might be devised, the council will still be highly dependent on agency goodwill for its effectiveness. Lacking staff, even the initial development of its proposed initiatives would be dependent on the relative priority assigned to coordination by the participating agencies. The council may not prove to have the clout or sustained interest needed to assure continued involvement by policy-level officers or to force migrant coordination issues onto the agendas of the department heads who would retain ultimate authority.

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[246] Such assignments of lead agencies are often provided for by statute, either designating an agency for a task directly or specifying the procedure in more general terms. See, e.g., 42 U.S.C.A. §7521(a)(6) (West Supp. 1991) (part of the Clean Air Act Amendments of 1990, assigning EPA lead responsibility to develop regulations, within 1 year, governing on-board systems for the control of vehicle refueling emissions, after mandatory consultation with the Secretary of Transportation on safety questions); 21 U.S.C. §1504(d) (stating that the "President shall designate lead agencies with areas of principal responsibility for carrying out the National Drug Control Strategy").

D. A Coordinator for Migrant and Seasonal Farmworker Programs

Many of the disadvantages associated with the interagency council model could be remedied by creating a new central office of coordinator, with an identity separate from any of the constituent agencies and with its own staff. Its mission would focus wholly on coordination of programs and more effective use of overall resources devoted to MSFW service programs. The person appointed as coordinator could also function, within the government and in relations with the public, as a spokesperson and farmworker advocate.

1. Models

There are numerous possible models for such an office. Three are examined here.

a. The Office of National Drug Control Policy

In 1988, after earlier bills had been vetoed, Congress finally succeeded in enacting a statute creating the Office of National Drug Control Policy in the Executive Office of the President.[247] The statute was born of congressional frustration over the perceived inability of the dozens of agencies involved in drug control to come together to develop a consolidated strategy to achieve the overall objectives, and the new structure replaced three earlier drug policy councils or boards.[248] The office is headed by a director, appointed by the President with the advice and consent of the Senate, and three other top officials are likewise made Presidential appointees subject to Senate approval.

The director is charged with developing, modifying, and ensuring the implementation of a national drug control strategy.[249] To this end all other agencies involved in drug control must give advance notice to the Office of any proposed changes in policies. The Director then reviews the proposal and certifies whether it is consistent with the national strategy.[250] He may not directly countermand such policies, however, even if he finds them inconsistent with the strategy. To that extent he does not have genuine supervisory authority--a hard-fought concession won by the other agencies during congressional deliberations on the bill. The Director has a similar role in budget review of each of the agencies' requests, with the responsibility to certify the adequacy of the budget in light of the published national strategy.[251] (The total budget for these purposes in 1992 is $12.7 billion.) In sum, the director does not have direct authority over agency policies or budgets, but can use the certification process and attendant publicity to "shame" an agency into changing a policy or a budget request, or else force the matter onto the President's desk for resolution. This can of course be a considerable power, but it is dependent on the Director's own skills and relationship with the President. The position was relatively powerful during the tenure of its first incumbent, William Bennett, but is now regarded as considerably weaker under Bob Martinez.[252] Moreover, despite its limited statutory authority, the Office has grown to be quite large, with a staff of 130 and an annual budget of $19 million. Some observers question whether it effectively accomplishes the coordination objective Congress originally had in mind.[253]

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[247] Pub. L. No. 100-690, Title I, 102 Stat. 4181 (codified to 21 U.S.C. §1501 et seq.).

[248] 1988 Cong. Q. Almanac 110.

[249] 29 U.S.C. §1502(b).

[250] Id. §1503.

b. The Office of Science and Technology Policy

The Office of Science and Technology Policy (OSTP) was created by statute in 1976,[254] to provide comprehensive overview of, and coordination among, scientific endeavors throughout the federal government. The office was placed in the White House, as one of the 11 agencies that make up the Executive Office of the President. As of 1988, it had a total full-time staff of 31, including 12 detailed to OSTP from the other agencies of the government most involved in science and technology questions.[255] The director, who is also the President's Science Advisor, chairs the White House Science Council, an advisory body, and also a Federal Coordinating Council on Science, Engineering and Technology. The Coordinating Council's other members are the senior science and engineering executives of each agency with substantial technical involvement. Other interagency committees on specific scientific fields or on specific new initiatives report to this Council.[256] OSTP helps devise strategies for the most effective use of federal scientific resources, such as in supporting new technologies like superconductors. As described by the director, the system collects a wide range of options and a wide range of views on those options, and then, "while forming consensus where that is possible, highlights issues and . . . raises them to a higher level for resolution."[257] It also has a defined role in budget guidance and review.[258]

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[251] Id. §1502(c).

[252] See Isikoff, Martinez Suffers Setbacks in Post as Anti-Drug Chief, Wash. Post, Feb. 24, 1992, at A1.

[253] See id.

[254] Pub. L. No. 94-282, 90 Stat. 459 (1976), codified in 42 U.S.C. §6601 (1988).

[255] Oversight of the Office of Science and Technology Policy, Hearing Before the Subcomm. on Science Research and Technology of the House Comm. on Science, Space and Technology, 100th Cong., 1st Sess., at 6-7 (1988) (statement of Dr. William R. Graham, OSTP Director).

[256] Id. at 7.

c. The Coordinator for Refugee Affairs

Although the two previous descriptions suggest several functions like those that might profitably be performed by a MSFW Coordinator, each model's relevance may be limited. Science policy has a much wider reach than do migrant programs, touching on many more agencies and overall policy objectives. Drug control is a major priority for the nation, and the billions of dollars involved in the anti-drug effort dwarf the scope of MSFW assistance.

A model on a somewhat more modest scale, which may be more instructive for present purposes, is the office of the U.S. Coordinator for Refugee Affairs. Refugee admission programs involve the efforts of the State Department, the Justice Department's Immigration and Naturalization Service, HHS's Office of Refugee Resettlement, and sometimes other agencies. After resettlement, other departments, such as Education and Labor, frequently play a role in supporting a successful transition to life in a new homeland. When refugee programs expanded greatly in the late 1970s as the exodus from Southeast Asia accelerated, the need for better coordination among the agencies became acute. Accordingly the executive branch created the office of the U.S. Coordinator for Refugee Affairs in 1979. A year later, when the Refugee Act of 1980 was passed, the office was given statutory mandate and a specific list of duties.[259]

Under that statute (reprinted in Appendix D), the Coordinator is appointed by the President with the Senate's advice and consent. He or she is responsible to the President for development of overall policy on refugee admission and resettlement, and for coordination of programs "in a manner that assures that policy objectives are met in a timely fashion." That official is also to design an overall budget strategy on these matters, to "provide guidance" to the agencies in preparing their own budget requests and to give OMB an overview of these issues. The statute specifically mentions the coordinator's role as an advisor to the three department heads most closely involved, and it also instructs the Coordinator to develop effective liaison with state and local governments and nongovernmental organizations involved with refugee resettlement.[260] The Coordinator, whose office is based in the State Department (an arrangement that has been criticized[261]) holds the rank of ambassador-at-large and also assumes some responsibility for international representation and negotiation. The office now has a professional staff of seven who cover both domestic and international issues and maintain liaison with each of the affected agencies. In earlier years the number of staff has sometimes been much higher, including several officers detailed from other agencies.[262]

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[257] Id. at 12.

[258] The OSTP director described this role: "In the area of budget guidance and review, OSTP interacts with the agencies of the government during the budget formation process, and then works in partnership with its fellow agency--the Office of Management and Budget--when the overall federal budget is prepared for review by the President." Id. at 12.

[259] Pub. L. No. 96-212, §301, 94 Stat. 109 (1980), codified at 8 U.S.C. §1525 (1988).

2. A Proposed MSFW Coordinator

Many of the functions of the Refugee Coordinator's office listed in the statute are exactly those that a Coordinator for Migrant and Seasonal Farmworker Service Programs should accomplish. If this option is chosen, however, it would probably be advisable not to locate the MSFW Coordinator's office in any of the departments now having migrant service programs. Whatever the merits of placing the Refugee Coordinator in the State Department,[263] it appears especially important for the MSFW Coordinator to develop a perspective that transcends departmental parochialism. That process would be difficult if staff and budget are under the ultimate control of just one of the departments. Equally important, a coordinator must not be *perceived* as simply an advocate for one of the agencies.[264] The logical place for such a transdepartmental office is the White House (as is the case with the Drug Control Office and OSTP.)

This option could be combined with some sort of improved interagency council, as described in the preceding section. But it holds certain advantages over the former. Giving one individual focused responsibility for interagency coordination, rather than assigning it to a collegial body made up of persons with other substantial responsibilities in their own departments, obviously improves the odds that coordination will receive sustained attention. Unlike a temporary chairman drawn from Deputy Assistant Secretary ranks, the Coordinator may develop the stature to keep coordination proposals on the front burner and before the necessary high-level officials in other agencies, rather than having to work a proposal up through multiple departmental layers and then wait while it gets placed onto the crowded agenda of a deparment head. The new position would provide a visible sign of the priority given to interagency coordination and the development of improved service delivery to the MSFW population. (On the other hand, recent disaffection with the Drug Control Policy office indicates that such outcomes are by no means assured.)

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[260] Id.

[261] See, e.g., N.L. Zucker & N.F. Zucker, The Guarded Gate: The Reality of American Refugee Policy 124-37; 281-82 (1987); Select Commission on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest 197 (Final Report, 1981).

[262] Interview with Dr. Luke Lee, Director of Plans and Programs, Office of the U.S. Coordinator for Refugee Affairs, October 22, 1991.

[263] Critics of placing the Refugee Coordinator's office in the State Department argue that this location risks identifying the office too much with only one of the affected agencies; the White House, in this view, is the logical site, owing to the Coordinator's transdepartmental responsibilities. The counterargument is that refugee resettlement is inevitably tied closely to overseas developments, and that the Coordinator's ambassadorial functions further support placement in the State Department. Despite the controversy, the office has remained in State throughout its existence.

[264] See Zucker & Zucker, supra note 259, at 282.

We encountered two types of strong objections when we mentioned early versions of this proposal to create a federal coordinating entity during our interviews. The first was aptly captured by one official's comment: "Oh Lord, not another entity!" In his view, and that of others who share this opinion, adding such an office simply means proliferating committee meetings and paperwork. Drawing on his own recent experience in another agency that had been brought under the umbrella of the White House Drug Control Office in 1988, he suggested that massive studies might be ordered and strategy papers written, but actual program changes in the interest of improved coordination or service delivery would prove no easier to achieve than at present. Another layer of unproductive bureaucracy, necessarily distant from actual service provision and hence unfamiliar with the real challenges as experienced by field-level providers, would spring into being, competing for resources that should instead go directly for services.

The other set of objections focused on placing this office in the White House. Such a step, some argued, would damage the programs by politicizing MSFW service issues. MSFW issues can of course be highly contentious and adversarial, it was conceded, particularly over enforcement regimes like pesticide regulations, or housing code compliance, or minimum wage obligations. In those settings, the struggle between growers and farmworker advocates sometimes achieves epic proportions. But services for farmworkers have become relatively depoliticized. More and more agricultural interests see these services as part of the benefits available to their workers, and so are less inclined to resist their extension. They may even become advocates of new clinics or centers for their locality. This state of affairs should not be disturbed. According to those who advance this objection, getting the White House directly involved by means of a Coordinator's office would invite dragging service programs into overtly political initiatives aimed at electoral advantage.

Both these objections carry weight and identify real risks. Whether the risks are worth running depends on an assessment of the gains to be expected from this type of coordination regime. Such gain is inevitably hard to gauge in advance. Its realization depends not only on structural design but also on present imponderables, such as the diligence, persistence, and common sense of the people who fill the key positions. In any event, our interviews did generate a few ideas that might help alleviate some of the concerns reflected in these objections. For example, the office itself should remain small, with a lean staffing pattern; extra staffers mean more capacity to demand reports or other paperwork from the agencies, with less regard for the real need for such endeavors. Perhaps a half-dozen professionals should be adequate, and some of these should be persons detailed from the agencies.

Steps were also suggested to minimize the risk of unseemly political misuse of a coordinator's office.[265] First, to minimize the incentive for some such distortion, the statute, order or memorandum establishing the office should rigidly provide that the coordinator would have responsibility for MSFW service programs only, not for enforcement regimes affecting farmworkers. As noted above, the latter regimes are more closely associated with adversarial struggles between growers and workers. Any perception of the office as having significant authority over such enforcement would raise the stakes surrounding the choice of the coordinator, thus increasing the risk of political interventions in a manner that would be detrimental to central service program objectives.

Second, if the office were to be created by statute, the statute itself could specify the coordinator's qualifications and the office's functions, and perhaps include other safeguards minimizing the risk of politicization. For example, as one MHS grantee suggested, the statute might require that the Coordinator be a person with a stated minimum of field experience in MSFW service programs.[266] Although newcomers to the area might well serve with distinction (as has sometimes been the case with the Refugee Coordinator position), requiring such field experience would improve the odds that the office is filled by someone sympathetic to the programs' service objectives and more willing to resist partisan pressures from elsewhere in the White House. Such a person might also be more careful to shield service programs from burdensome reporting or paperwork.

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[265] Some who voiced the objection to a White House based coordinator suggested that the Coordinator's office should be independent, with the Coordinator removable by the President only for stated cause. Such an approach is not workable. Because the office would lack operational responsibilities or capacities, its initiatives must all ultimately be implemented by departmental personnel. High departmental officials have reasons to listen to initiatives that come from the Executive Office. Even if they resist, a White House-based Coordinator would be in a position (as is OSTP) to raise the dispute to a higher level for resolution. An independent body lacks this institutional clout, especially when seeking action from nonindependent executive-branch agencies. Without any hope of such leverage, a coordinator's office is essentially pointless.

[266] It is an open question whether the Constitution permits limits of this kind on the President's appointment power, particularly for a position in the Executive Office of the President.

Appendix E contains a draft statute to create such an office, modeled on the Refugee Coordinator legislation.

E. Recommendation

Although the question is a close one, we favor the interagency coordinating council model. It is true that many service providers we interviewed seemed excited about the idea of a White House coordinator, but that excitement probably had more to do with the symbolism of such an office than with sound judgments about what it could realistically hope to accomplish.[267] Mere location in the White House is not likely to lead to the priority for MSFW service issues that these providers hope for.

Incremental improvement to coordination through a revitalized interagency council appears more promising and more realistic. Though the most recent effort of this type has foundered, we hold out modest hope that the process can be energized by the sort of institutional charter sketched above, provided by Congress or the President, particularly one that mandates action within a stated time on one or two initial coordination tasks. Although a statutory charter would perhaps be more enduring, it is also more difficult to secure than a document issued by the President. We therefore recommend that efforts should focus on the issuance of an Executive Order containing a charter for an interagency council. The modesty of this conclusion may seem anticlimactic, but we believe that this approach can be made to produce, in a relatively short time frame, some real improvements in the services provided to the nation's farmworkers.

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[267] Once again, Harold Seidman has provided insightful commentary:

> The establishment of agencies within the Executive Office of the President is also sought by professions and interest groups as a means for maximizing access and influence and obtaining status and prestige. . . . [But the] degree to which location within the Executive Office of the President enhances power and influence within the executive branch or with the Congress is questionable. The power of Executive Office agencies is derived from the functions they perform--not organization location. . Influential units . . . . are those that provide direct support to the President in conducting presidential business or that control action-forcing processes such as the budget and legislative clearance. Seidman, A Typology of Government, in Federal Reorganization, supra note 238, at 39-40.

Appendix A

Glossary of Acronyms

ACUS	Administrative Conference of the United States
AFDC	Aid to Families with Dependent Children
AFOP	Association of Farmworker Opportunity Programs
CAMP	College Assistance Migrant Program
CETA	Comprehensive Employment and Training Act
CHC	Community Health Center
COA	Census of Agriculture
COP	Census of Population
CPS	Current Population Survey
CRESS	Clearinghouse on Rural Education and Small Schools
DOL	Department of Labor
ECIA	Education Consolidation and Improvement Act
EPA	Environmental Protection Agency
ERIC	Educational Resources Information Center
ETA	Employment and Training Administration
FLSA	Fair Labor Standards Act
FTE	Full-Time Equivalent
GAO	General Accounting Office
HEP	High School Equivalency Program
HEW	Department of Health, Education and Welfare
HFWF	Hired Farm Working Force
HHS	Department of Health and Human Services
IRCA	Immigration Reform and Control Act
JPTA	Job Training Partnership Act
LEA	Local Education Agency
LSC	Legal Services Corporation
ME	Migrant Education
MH	Migrant Health
MHC	Migrant Health Center
MHS	Migrant Head Start
MSFW	Migrant and Seasonal Farm Workers
MSRTS	Migrant Student Record Transfer System
NACHC	National Association of Community Health Centers
NACMH	National Advisory Council on Migrant Health
NASDME	National Association of State Directors of Migrant Education

NAWS	National Agricultural Survey Workers
NLRA	National Labor Relations Act
NMRP	National Migrant Resource Program
OEO	Office of Economic Opportunity
OMB	Office of Management and Budget
OSTP	Office of Science and Technology Policy
PCC	Program Coordination Center
PIC	Private Industry Council
QALS	Quarterly Agricultural Labor Survey
SEA	State Education Agency
SIC	Standard Industrial Classification
SOC	Standard Occupational Classification
UI	Unemployment Insurance
USDA	United States Department of Agriculture
WIC	Supplemental Food Program for Women Infants and Children

Appendix B

Statutory and Regulatory Definitions Used in Selected Programs Serving Migrant and Seasonal Farmworkers

Migrant Education

20 U.S.C.A. §2782(c) (West 1990):

> The Secretary shall continue to use the definitions of "agricultural activity," "currently migratory child", and "fishing activity" which were published in the Federal Register on April 30, 1985, in regulations prescribed under section 555(b) of the Education Consolidation and Improvement Act of 1981 and subpart 1 of part B of title I of the Elementary and Secondary Education Act of 1965 (as in effect on April 30, 1985). No additional definition of "migratory agricultural worker" or "migratory fisherman" may be applied to the provisions of this subpart.

34 CFR §201.3(b) (1990):

Agricultural activity means:

(1) Any activity directed related to the production or processing of crops, dairy products, poultry, or livestock for initial commercial sale or as a principal means of personal subsistence;

(2) Any activity directly related to the cultivation or harvesting of trees; or

(3) Any activity directly related to fish farms.

* * *

Currently migratory child means a child:

(1) Whose parent or guardian is a migratory agricultural worker or a migratory fisher; and

(2) Who has moved within the past 12 months from one school district to another--or, in a state that is comprised of a single school district, has moved from one school administrative area to another--to enable the child, the child's guardian, or a member of the child's

immediate family to obtain temporary or seasonal employment in an agricultural or fishing activity. This definition includes a child who has been eligible to be served under the requirements in the preceding sentence, and who, without the parent or guardian, has continued to migrate annually to enable him or her to secure temporary or seasonal employment in an agricultural or fishing activity. This definition also includes children of migratory fishermen, if those children reside in a school district of more than 18,000 square miles and migrate a distance of 20 miles or more to temporary residences to engage in fishing activity.

* * *

> *Fishing activity* means any activity directly related to the catching or processing of fish or shellfish for initial commercial sale or as a principal means of personal subsistence.

> *Formerly migratory child* means a child who:

(1) Was eligible to be counted and served as a currently migratory child within the past 5 years, but is not now a currently migratory child; and

(2) Has the concurrence of his or her parent or guardian to continue to be considered a migratory child.

> *Migratory agricultural worker* means a person who has moved within the past 12 months from one school district to another--or, in a state that is comprised of a single school district, has moved from one school administrative area to another--to enable him or her to obtain temporary or seasonal employment in an agricultural activity (including dairy work).

> *Migratory children* means children who qualify under either the definition of "currently migratory child" or "formerly migratory child" described in this section.

> *Migratory fisher* means a person who has moved within the past 12 months from one school district to another--or, in a state that is comprised of a single school district, has moved from one school administrative area to another--to enable him or her to obtain temporary or seasonal employment in a fishing activity.

HEP/CAMP

20 U.S.C.A. §1070d-2 (West 1990):

(b) Services provided by high school equivalency program

The services authorized by this subpart for the high school equivalency program include--

(1) recruitment services to reach persons who are 17 years of age and over, who themselves or whose parents have spent a minimum of 75 days during the past 24 months in migrant and seasonal farmwork, and who lack a high school diploma or its equivalent;

* * *

(c) Services provided by college assistance migrant program

Services authorized by this subpart for the college assistance migrant program include--

(1) outreach and recruitment services to reach persons who themselves or whose parents have spent a minimum of 75 days during the past 24 months in migrant and seasonal farmwork, and who meet the minimum qualifications for attendance at a college or university;

* * *

34 CFR §206.5(c) (1990):

(2) "Agricultural activity" means:

(i) Any activity directly related to the production of crops, dairy products, poultry, or livestock;

(ii) Any activity directly related to the cultivation or harvesting of trees; or

(iii) Any activity directly related to fish farms.

(3) "Farmwork" means any agricultural activity, performed for either wages or personal subsistence, on a farm, ranch, or similar establishment.

* * *

(6) "Migrant farmworker" means a seasonal farmworker--as defined in paragraph (c)(7) of this section--whose employment required travel that precluded the farmworker from returning to his or her domicile (permanent place of residence) within the same day.

(7) "Seasonal farmworker" means a person who, within the past 24 months, was employed for at least 75 days in farmwork, and whose primary employment was in farmwork on a temporary or seasonal basis (that is, not a constant year-round activity).

Migrant Health

42 U.S.C.A. §254b(a) (West 1991):

(2) The term "migratory agricultural worker" means an individual whose principal employment is in agriculture on a seasonal basis, who has been so employed within the last 24 months, and who establishes for the purposes of such employment a temporary abode.

(3) The term "seasonal agricultural workers" means an individual whose principal employment is in agriculture on a seasonal basis and who is not a migratory agricultural worker.

(4) The term "agriculture" means farming in all its branches, including--

(A) cultivation and tillage of the soil,

(B) the production, cultivation, growing, and harvesting of any commodity grown on, in, or as an adjunct to or part of a commodity grown in or on, the land, and

(C) any practice (including preparation and processing for market and delivery to storage or to market or to carriers for transportation to market) performed by a farmer or on a farm incident to or in conjunction with an activity described in subparagraph (B).

42 CFR §56.102 (1990):

(b)(1) *Agriculture* means farming in all its branches, including--

(i) Cultivation and tillage of the soil;

(ii) The production, cultivation, growing, and harvesting of any commodity grown on, in, or as an adjunct to or part of a commodity grown in, or on, the land; and

(iii) Any practice (including preparation and processing for market and delivery to storage or to market or to carriers for transportation to market) performed by a farmer or on a farm incident to or in conjunction with an activity described in subsection (ii).

* * *

(h) *Migratory agricultural worker* means an individual whose principal employment is in agriculture on a seasonal basis, who has been so employed within the last 24 months, and who establishes for the purpose of such employment a temporary place of abode;

* * *

(m) *Seasonal agricultural worker* means an individual whose principal employment is in agriculture on a seasonal basis and who is not a migratory agricultural worker.

Migrant Head Start

(42 U.S.C.A. §9831 (West 1983 & Supp. 1991))

[No statutory or regulatory definitions at present. Proposed rules are set forth.]

55 Fed. Reg. 29,970 (July 23, 1990) (notice of proposed rulemaking) (proposed 42 CFR §1305.2(*l*)):

(1) *Migrant family* means, for purposes of Head Start eligibility, a family with children under the age of compulsory school attendance who change their residence by moving from one geographic location to another, either intrastate or interstate, for the purpose of engaging in agricultural work that involves the production and harvesting of tree and field crops and whose family income comes primarily from this activity.

Job Training Partnership Act, §402

(29 U.S.C.A. §1672 (West 1985))

20 CFR §633.104 (1990):

Farmwork shall mean, for eligibility purposes, work performed for wages in agricultural production or agricultural services as defined in the most recent edition of the Standard Industrial Classification (SIC) Code definitions included in industries 01--Agricultural Production--Crops; 02--Agricultural Production--Livestock excluding 027--Animal Specialties; 07--Agricultural Services excluding 074--Veterinary Services, 0752--Animal Specialty Services, and 078--Landscape and Horticultural Services.

* * *

Migrant farmworker shall mean a seasonal farmworker who performs or has performed farmwork during the eligibility determination period (any consecutive 12-month period within the 24-month period preceding application for enrollment) which requires travel such that the worker is unable to return to his/her domicile (permanent place of residence) within the same day.

* * *

Seasonal farmworker shall mean a person who during the eligibility determination period (any consecutive 12-month period within the 24-month period preceding application for enrollment) was employed at least 25 days in farmwork or earned at least $400 in farmwork; and who has been primarily employed in farmwork on a seasonal basis, without a constant year-round salary.

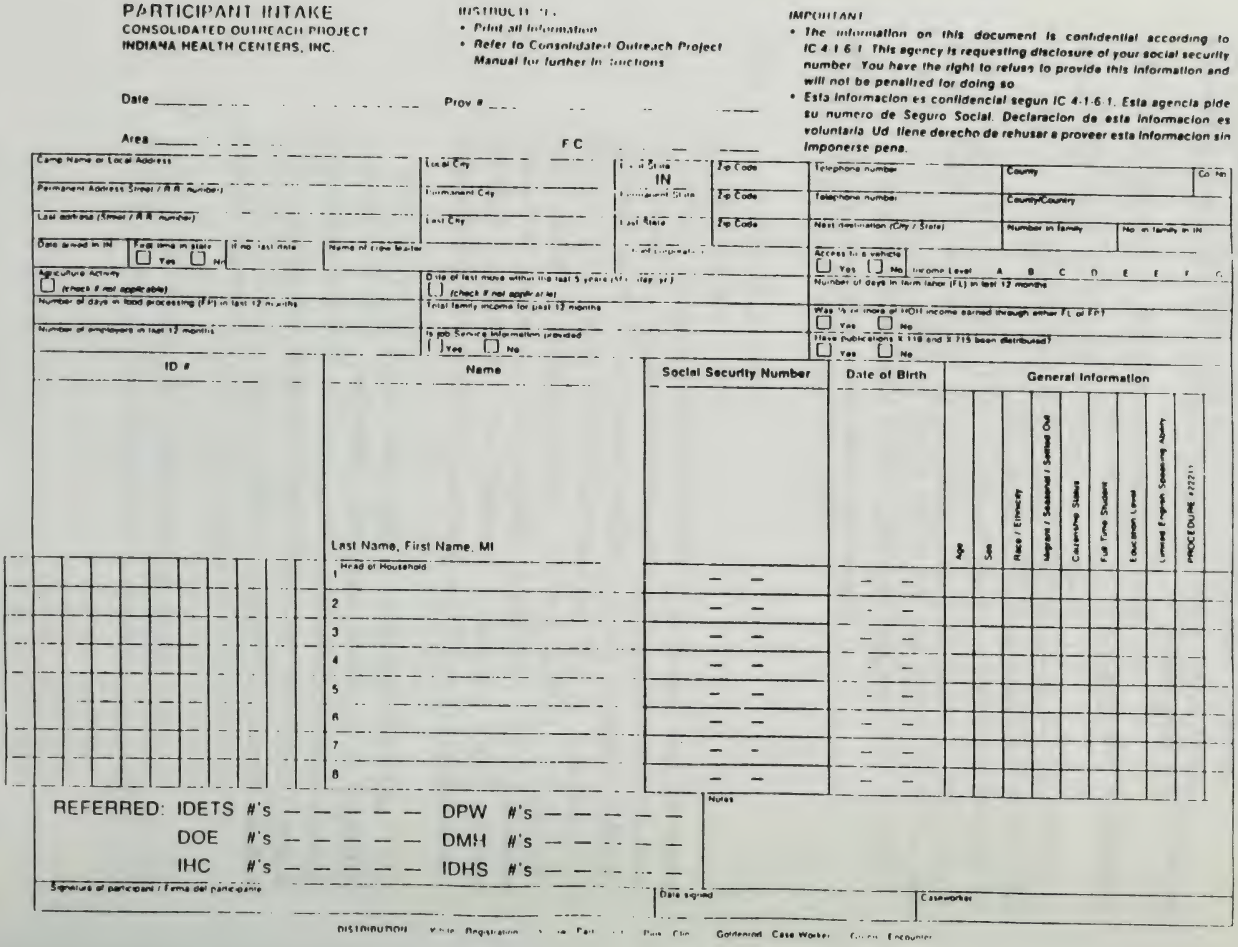
Id. §633.107:

(a) Eligibility for participation in Section 402 programs is limited to those individuals who have, during any consecutive 12-month period within the 24-month period preceding their application for enrollment:

> (1) Been a seasonal farmworker or migrant farmworker as defined in §633.104; and,
>
> (2) Received at least 50 percent of their total earned income or been employed at least 50 percent of their total work time in farmwork; and,
>
> (3) Been identified as a member of a family which receives public assistance or whose annual family income does not exceed the higher of either the poverty level or 70 percent of the lower living standard income level.
>
> (4) Dependents of the above individuals are also eligible.

Appendix C

First Chart



PARTICIPANT INTAKE
CONSOLIDATED OUTREACH PROJECT
INDIANA HEALTH CENTERS, INC.

INSTRUCTIONS
- Print all information
- Refer to Consolidated Outreach Project Manual for further instructions

IMPORTANT
- *The information on this document is confidential according to IC 4-1-6-1. This agency is requesting disclosure of your social security number. You have the right to refuse to provide this information and will not be penalized for doing so.*
- *Esta informacion es confidencial segun IC 4-1-6-1. Esta agencia pide su numero de Seguro Social. Declaracion de esta informacion es voluntaria. Ud tiene derecho de rehusar a proveer esta informacion sin imponerse pena.*

Date ______ Prov # ______

Area ______ F C ______

Camp Name or Local Address | Local City | Local State IN | Zip Code | Telephone number | County | Co. No.

Permanent Address Street / R.R. number) | Permanent City | Permanent State | Zip Code | Telephone number | County/Country

Last address (Street / R.R. number) | Last City | Last State | Zip Code | Next destination (City / State) | Number in family | No. in family in IN

Date arrived in IN | First time in state ☐ Yes ☐ No | If no, last date | Name of crew leader

Access to a vehicle ☐ Yes ☐ No | Income Level A B C D E E F G

Agriculture Activity ☐ (check if not applicable) | Date of last move within the last 5 years (Mo. day yr.) ☐ (check if not applicable) | Number of days in farm labor (FL) in last 12 months

Number of days in food processing (FP) in last 12 months | Total family income for past 12 months | Was ½ or more of HOH income earned through either FL or FP? ☐ Yes ☐ No

Number of employers in last 12 months | Is Job Service information provided ☐ Yes ☐ No | Have publications X 118 and X 715 been distributed? ☐ Yes ☐ No

ID #	Name Last Name, First Name, MI	Social Security Number	Date of Birth	Age	Sex	Race / Ethnicity	Migrant / Seasonal / Settled Out	Citizenship Status	Full Time Student	Education Level	Limited English Speaking Ability	PROCEDURE #22211
	1 Head of Household	— —	— —									
	2	— —	— —									
	3	— —	— —									
	4	— —	— —									
	5	— —	— —									
	6	— —	— —									
	7	— —	— —									
	8	— —	— —									

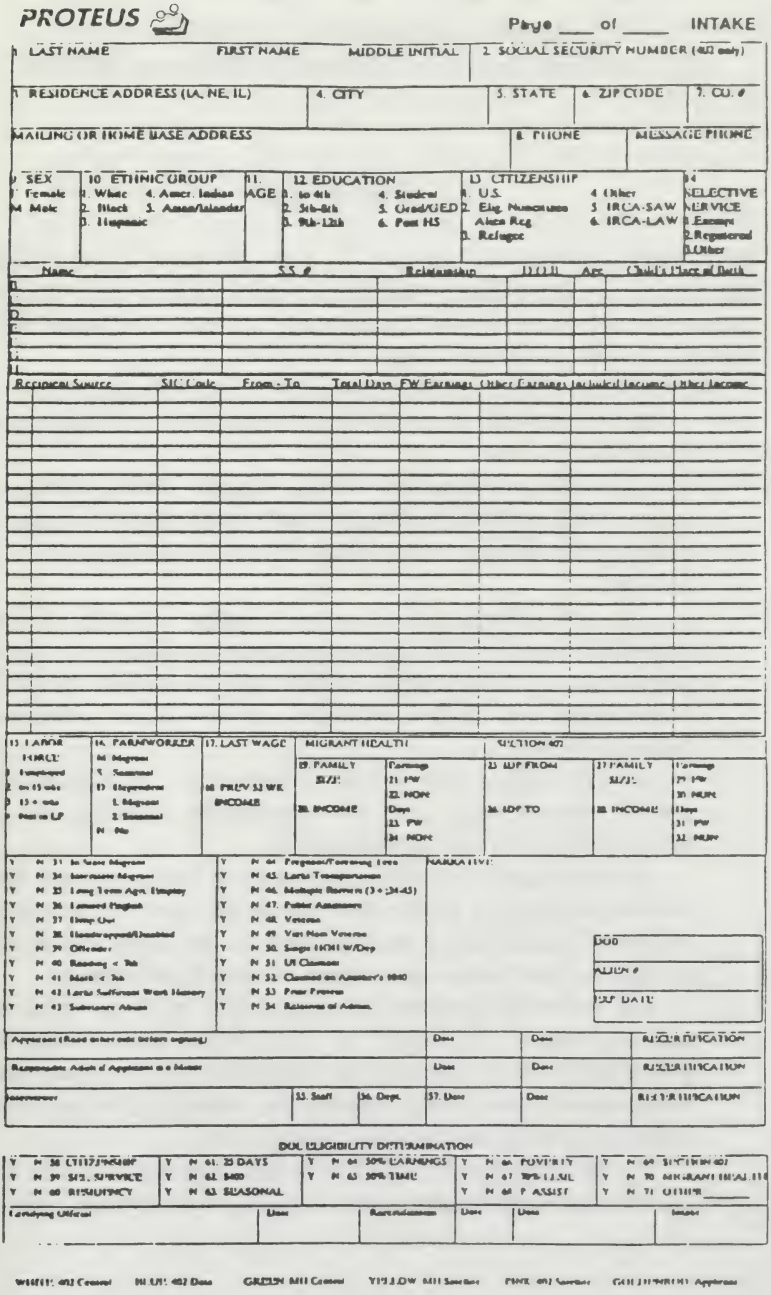
REFERRED: IDETS #'s ______ DPW #'s ______
DOE #'s ______ DMH #'s ______
IHC #'s ______ IDHS #'s ______

Notes

Signature of participant / Firma del participante | Date signed | Caseworker

DISTRIBUTION White Registration [illegible] Pink [illegible] Goldenrod Case Worker [illegible] Encounter

Second Chart



PROTEUS

Page ___ of ____ INTAKE

1. LAST NAME FIRST NAME MIDDLE INITIAL
2. SOCIAL SECURITY NUMBER (402 only)
3. RESIDENCE ADDRESS (IA, NE, IL)
4. CITY
5. STATE
6. ZIP CODE
7. CO. #

MAILING OR HOME BASE ADDRESS
8. PHONE
MESSAGE PHONE

9. SEX
F Female
M Male

10. ETHNIC GROUP
1. White
2. Black
3. Hispanic
4. Amer. Indian
5. Asian/Islander

11. AGE

12. EDUCATION
1. to 4th
2. 5th-8th
3. 9th-12th
4. Student
5. Grad/GED
6. Post HS

13. CITIZENSHIP
1. U.S.
2. Elig. Noncitizen Alien Reg
3. Refugee
4. Other
5. IRCA-SAW
6. IRCA-LAW

14. SELECTIVE SERVICE
1. Exempt
2. Registered
3. Other

Name SS # Relationship DOB Age Child's Place of Birth

Recipient Service SIC Code From - To Total Days FW Earnings Other Earnings Included Income Other Income

15. LABOR FORCE
1. Employed
2. on 15 wks
3. 15 + wks
4. Not in LF

16. FARMWORKER
M Migrant
S Seasonal
D Dependent
1. Migrant
2. Seasonal
N No

17. LAST WAGE

18. PREV 52 WK INCOME

MIGRANT HEALTH
19. FAMILY SIZE
20. INCOME
Earnings
21. FW
22. NON
Days
23. FW
24. NON

SECTION 402
25. EDP FROM
26. EDP TO
27. FAMILY SIZE
28. INCOME
Earnings
29. FW
30. NON
Days
31. FW
32. NON

Y N 33 In State Migrant
Y N 34 Interstate Migrant
Y N 35 Long Term Agr. Employ
Y N 36 Limited English
Y N 37 Drop Out
Y N 38 Handicapped/Disabled
Y N 39 Offender
Y N 40 Reading < 7th
Y N 41 Math < 7th
Y N 42 Lacks Sufficient Work History
Y N 43 Substance Abuse

Y N 44 Pregnant/Parenting Teen
Y N 45 Lacks Transportation
Y N 46 Multiple Barriers (3+;34-43)
Y N 47 Public Assistance
Y N 48 Veteran
Y N 49 Viet Nam Veteran
Y N 50 Single HOH W/Dep
Y N 51 UI Claimant
Y N 52 Claimed on Another's 1040
Y N 53 [illegible]
Y N 54 [illegible]

NARRATIVE:

DOB
ALIEN #
EXP. DATE

Applicant (Read other side before signing) Date Date RECERTIFICATION
Responsible Adult if Applicant is a Minor Date Date RECERTIFICATION
Interviewer 55. Staff 56. Dept. 57. Date Date RECERTIFICATION

DOL ELIGIBILITY DETERMINATION

Y N 58 CITIZENSHIP
Y N 59 SEL. SERVICE
Y N 60 RESIDENCY
Y N 61. 25 DAYS
Y N 62. $400
Y N 63. SEASONAL
Y N 64 50% EARNINGS
Y N 65 50% TIME
Y N 66 POVERTY
Y N 67 70% LLSIL
Y N 68 P. ASSIST
Y N 69 SECTION 402
Y N 70 MIGRANT HEALTH
Y N 71 OTHER ______

Certifying Official Date Recertification Date Date [illegible]

WHITE 402 Control BLUE 402 Data GREEN MH Control YELLOW MH Section PINK 402 Section GOLDENROD Applicant

Appendix D

Statute Establishing the Office of United States Coordinator for Refugee Affairs

(8 U.S.C. §1525)

(a) The President shall appoint, by and with the advice and consent of the Senate, a United States Coordinator for Refugee Affairs (hereinafter in this part referred to as the "Coordinator"). The Coordinator shall have the rank of Ambassador-at-Large.

(b) The Coordinator shall be responsible to the President for--

(1) the development of overall United States refugee admission and resettlement policy;

(2) the coordination of all United States domestic and international refugee admission and resettlement programs in a manner that assures that policy objectives are met in a timely fashion;

(3) the design of an overall budget strategy to provide individual agencies with policy guidance on refugee matters in the preparation of their budget requests, and to provide the Office of Management and Budget with an overview of all refugee-related budget requests;

(4) the presentation to the Congress of the Administration's overall refugee policy and the relationship of individual agency refugee budgets to that overall policy;

(5) advising the President, Secretary of State, Attorney General, and the Secretary of Health and Human Services on the relationship of overall United States refugee policy to the admission of refugees to, and the resettlement of refugees in, the United States;

(6) under the direction of the Secretary of State, representation and negotiation on behalf of the United States with foreign governments and international organizations in discussions on refugee matters and, when appropriate, submitting refugee issues for inclusion in other international negotiations;

(7) development of an effective and responsive liaison between the Federal Government and voluntary organizations, Governors

and mayors, and others involved in refugee relief and resettlement work to reflect overall United States Government policy;

(8) making recommendations to the President and to the Congress with respect to policies for, objectives of, and establishment of priorities for, Federal functions relating to refugee admission and resettlement in the United States; and

(9) reviewing the regulations, guidelines, requirements, criteria, and procedures of Federal departments and agencies applicable to the performance of functions relating to refugee admission and resettlement in the United States.

(c)(1) In the conduct of the Coordinator's duties, the Coordinator shall consult regularly with States, localities, and private nonprofit voluntary agencies concerning the sponsorship process and the intended distribution of refugees.

(2) The Secretary of Labor and the Secretary of Education shall provide the Coordinator with regular reports describing the efforts of their respective departments to increase refugee access to programs within their jurisdiction, and the Coordinator shall include information on each programs in reports submitted under section 413(a)(1) of the Immigration and Nationality Act.

Appendix E

Proposed Statute Establishing an Office of Coordinator for Migrant and Seasonal Farmworker Service Programs

(a) The President shall appoint, by and with the advice and consent of the Senate, a Coordinator for Migrant and Seasonal Farmworker Service Programs (hereinafter referred to as the "Coordinator"). [The Coordinator shall be selected from among persons having a minimum of two years' experience in a service program (either public or private nonprofit) for migrant and/or seasonal farmworkers.] The Coordinator's office shall be a part of the Executive Office of the President.

(b) The Coordinator shall be responsible to the President for

(1) the development of overall federal policy on services to migrant and seasonal farmworkers;

(2) the coordination of all federal programs that provide services to migrant and seasonal farmworkers in a manner that assures that policy objectives are met in a timely fashion, and that overlap and duplication are minimized;

(3) the design of an overall budget strategy to provide individual agencies with policy guidance on farmworker service matters in the preparation of their budget requests, and to provide the Office of Management and Budget with an overview of all budget requests relating to services for migrant and seasonal farmworkers;

(4) the presentation to the Congress of the Administration's overall policy regarding service programs for migrant and seasonal farmworkers and the relationship of individual agency budgets to that overall policy;

(5) advising the Attorney General, the Secretary of Agriculture, the Secretary of Education, the Secretary of Health and Human Services, the Secretary of Labor, and the heads of other affected departments and agencies on the relationship of overall farmworker service policy to the actions of their departments and agencies;

(6) development of an effective and responsive liaison between the federal government and governors and mayors, other state and local government bodies, voluntary organizations, nonprofit

corporations, and others involved in farmworker service programs to reflect overall United States government policy;

(7) making recommendations to the President and to the Congress with respect to policies for, objectives of, and establishment of priorities for, Federal functions relating to migrant and seasonal farmworkers; and

(8) reviewing the regulations, guidelines, requirements, criteria, and procedures of federal departments and agencies applicable to the performance of functions relating to service programs for migrant and seasonal farmworkers.

(c) In the conduct of the Coordinator's duties, the Coordinator shall consult regularly with states, localities, private nonprofit organizations, other service providers, and other affected individuals and organizations, regarding the effectiveness of service programs for migrant and seasonal farmworkers.

[illegible]

[illegible]

Report for Recommendation 92-5

Monitoring the Federal Government's Conduct Through Fee Shifting Under the Equal Access to Justice Act: An Inconclusive Experiment

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University of Virginia

This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

Executive Summary

Congress first waived the federal government's immunity from attorney fee awards under the Equal Access to Justice Act (EAJA), 5 U.S.C. §5O4, 28 U.S.C. §2412(d), in 1980 and reenacted the Act in 1985. Although the evidence before Congress was largely anecdotal, Congress primarily sought to aid small businesses, which it perceived were too often subject to arbitrary and oppressive governmental regulation. To that end, the EAJA authorizes private parties of modest size that prevail in nontort civil litigation against the United States in both courts and agencies to recover their fees and expenses. No recovery will be allowed, however, if the government demonstrates that its position was substantially justified, which has been construed to require the government to show that its position had a reasonable basis in both law and fact. Akin to a negligence standard, the substantial justification standard ensures that the government need pay fees only when its conduct can seemingly be considered "wrongful." In addition, the Act precludes fee awards to large parties and, under 28 U.S.C. §2412(d), sets a maximum hourly rate of $75 per hour. The rate can be raised if the court "determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee."

The success of the Act can be assessed by analyzing its effectiveness in accomplishing three possible congressional goals: first, to equalize the litigating strength of the government and private parties; second, to deter government wrongdoing; and third, to compensate parties injured by government wrongdoing.

First, the Act has had some success in providing an incentive to small parties to contest government overreaching through litigation. Although I have not been able to assess that incentive empirically, there are sound theoretical reasons to conclude that the Act has successfully led to more litigation against the government in two circumstances: when parties have small, strong monetary claims against the government, and when parties have nonmonetary claims against the government, as in many public interest law suits. Private parties, however, have ample incentive to contest government conduct in the vast majority of contexts without the carrot of fee shifting. For instance, most, if not all, contract claims would be brought against the United States irrespective of the prospect of fee shifting. Moreover, the substantial justification standard dampens the incentive effect of fee shifting by making the prospect of recovery less certain.

Second, the Act as a whole has had only marginal impact on deterrence of government wrongdoing. Because fee awards must be paid out of the offending agency's budget, Congress hoped that EAJA litigation would spur agencies to act more prudently when determining the rights of small parties in particular. Even if there is a significant amount of arbitrary behavior by government agencies--a proposition which I doubt--shifting fees is unlikely to bring about better governance for several reasons. As an initial matter, government policymakers are unlikely to consider the prospect of an attorney fee award in fashioning policy. Although they may realize that the policy will be attacked at some point in litigation, they will not know if a party eligible for fees will be the one making the challenge; nor are they likely to think that their policy could ever be considered not substantially justified. In addition, the fee award, whose average in nonsocial security court cases is only $40,000, is unlikely to be great enough to induce added care. When the EPA issues regulations, the threat of an attorney fee award is unlikely to change its behavior. Furthermore, even if agency policymakers considered the prospect of fees, the government does not generally quantify litigation costs--attorneys at DOJ may represent their client agencies at no charge, and agency attorneys generally do not record the time they spend on a particular case.

Although the EAJA is unlikely to deter government misconduct, it may have more impact in cases in which government officials apply policy to particular factual contexts, whether in land condemnation or benefits cases. In cases not involving general government policy, there may be a greater chance for arbitrary behavior because of the lack of political checks constraining the governmental conduct. Conversely, officials applying preexisting policy in fact-specific contexts are more likely to consider the prospect of fees either because the potential fee award represents a greater percentage of the total amount in controversy or because such officials in general are more likely to internalize general litigation costs than are their colleagues who fashion policy. For instance, because of limited resources, an agency may consider the prospect of an attorney fee award before devoting some of those scarce resources to initiating a new enforcement action.

Largely because of the EAJA's limited impact on deterrence, concerns for overdeterrence in the absence of the substantial justification standard are overblown. Not only are government officials unlikely to internalize fully the potential cost of an attorney fee award, but they may pursue certain objectives despite the potential for an adverse award. For instance, it may be so politically important to pursue false claims against former directors of insolvent S & L's that governmental officials will do so despite the risk of an award. Furthermore, the fear of overdeterrence is not acute given the safe harbor afforded many agency actions by deferential standards of review. In other words, the substantial justification standard will provide little protection beyond that provided by the substantial evidence in the record or arbitrary and capricious standard. Government officials are already protected to a certain extent from an adverse decision because of those deferential standards of review. Thus, the case for the substantial justification standard as a means of protecting against overdeterrence is weak.

The third possible goal underlying the Act is to compensate private parties injured by government wrongdoing. To begin with, there is a debate over whether payment of attorney's fees is necessary for full compensation. Under the American Rule of attorney's fees, each party must bear its own fees as a cost of living under our judicial system. Even if payment of fees is required for full compensation, however, the EAJA does not accomplish the goal consistently. Neither the government nor a large private party can collect fees when it prevails.

Despite the inconsistencies, some might argue that the substantial justification standard is critical to confine compensation to instances in which the government is at "fault," much as recovery in tort is generally limited to negligence. But notions of corrective justice might argue in favor of compensation even when the government's position is substantially justified. To some, wrongdoing is not synonymous with fault, and the government may be in some sense at fault every time its policy is determined to be arbitrary or its findings not supported by substantial evidence in the record. In addition, some might believe that compensation is justified from a corrective justice perspective whenever the government deprives a private party of an entitlement, even if the government was not negligent. In short, many would argue that the substantial justification standard blunts whatever corrective or distributive justice notions the Act attempts to further.

Thus, the Act has achieved only mixed success at best, providing some incentive for private parties injured by government action to contest that conduct more vigorously, and compensating some parties more fully for the injuries they have received at government hands. Moreover, the substantial justification standard arguably impedes all three goals underlying the Act--equalizing the litigating strength of the parties, deterring government wrongdoing, and pursuing corrective justice.

Costs

In face of the uncertain benefits wrought by the Act, the costs of administering the Act are excessive. One-way fee shifting under the EAJA increases the burden on the taxpayer in a number of ways. First, the potential for fee shifting likely makes settlement of the underlying action more difficult to accomplish, and second, the EAJA adds a new layer of costs by introducing an additional round of litigation generating more fees for government and private attorneys, and more adjudicative expense in courts and agencies. Ambiguous provisions in the Act, such as the provision allowing for enhancements when "a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee," or the substantial justification standard, impair the prospects for settlement and add to the costs of litigating the fee dispute. Repeal of the substantial justification standard, even if it would not induce settlement, would likely streamline the fee litigation. Although the government has defeated some large fee requests on the ground that its position had been substantially justified, litigation over that standard in other cases has cost the government almost as much money as it has saved.

To gauge more completely the costs of the EAJA in general and the substantial justification standard in particular, I studied all cases decided under the EAJA for a 1-year period of time. There were over 2,000 EAJA cases decided, which comprises 3% of the entire caseload of civil cases involving the government. Over 90% of all applications resolved arose out of individual benefits determinations, in which $5 million were awarded during the target year. The mean award in those cases was less than $3,500, and the government demonstrated that its position was substantially justified in slightly over 10% of all EAJA petitions filed. There were 27 other court cases, in which $1 million were awarded, and the government demonstrated that its position was substantially justified in roughly 20% of those cases. Finally, there were approximately 80 agency cases resolved during the target year, with less than $1 million in awards, and the government demonstrated substantial justification in roughly 30% of those cases. Thus, at least in all the cases litigated, the government saved only a modest amount--less than 20% of the EAJA fees claimed--because of the substantial justification standard, and litigation over that standard cost taxpayers almost as much money in government attorney time, private attorney time, and court time. Although the substantial justification standard deters some private parties from filing for fees, the government saves very little--putting that self-selection issue to the side--by arguing substantial justification in every case and thereby making the prospects of a quick settlement much less likely.

Suggested Revisions

Given the competing pull of the underlying policy goals--equalizing the parties' litigating strengths, minimizing governmental errors, furthering corrective justice, and preserving the public fisc--the choice of whether to rescind the Act, convert to automatic fee shifting, or do nothing may appear close. But, irrespective of one's views of the Act in general, automatic fee shifting is warranted in the individual benefits context, and the Act should be streamlined to minimize the potential for collateral litigation and maximize the prospects for settlement of at least the fee petition.

1. Congress should eliminate the substantial justification standard for fee applications arising out of individual benefit claims. First, automatic fee

shifting would ensure that even small beneficiaries, who may not be able to attract counsel through contingency fee arrangements, can obtain counsel. Otherwise, an individual with a meritorious $8,000 claim for back benefits might not be represented.

Second, automatic fee shifting would ensure greater utilization of EAJA by prevailing private parties seeking benefits. In the target year, only 30-40% of all prevailing claimants applied for EAJA fees, primarily, in my view, because private counsel stand to gain little and lose considerably by filing for fees. Private counsel through contingency fee arrangements generally can obtain up to 25% of back benefit awards, and that amount is usually greater than an EAJA award. If the EAJA award is collected, that amount must be returned to the beneficiary, and all work done on the petition is likely pro bono. Similarly, if the EAJA award is defeated, work on the petition probably cannot be billed to the impecunious client. Many counsel react by not filing for fees and thus saving themselves time and the SSA money. It is noteworthy that the percentage of cases in which the government is substantially justified is the same nationally as it is in two jurisdictions in which judges have required all prevailing parties to file for fees under EAJA or write a memorandum explaining why they are not pursuing the EAJA remedy.

Third, automatic fee shifting would spare the taxpayer significant expense because it would expedite settlement of the fee dispute and thereby ease the judicial workload, without fear of overdeterring SSA decisionmakers because they are protected by a deferential standard of review.

Finally, a change to automatic fee shifting in the social security disability context plausibly comports with corrective and distributive justice notions--the substantial evidence standard itself reflects a fault standard, and the prevailing beneficiaries can ill afford to pay up to 25% of their back benefits in attorney's fees.

2. Irrespective of whether the substantial justification standard is retained, the EAJA should be revised to foster settlement and reduce issues for litigation.

Offer of judgment provision. Congress should enact an offer of judgment provision, modeled loosely on Federal Rule of Civil Procedure 68, to provide that, if a private party rejects the government's offer of judgment in the EAJA dispute, it cannot thereafter claim fees for subsequent proceedings related to the EAJA claim if it does not receive more than the offer after judgment. This change would enable government counsel after losing a case to limit the government's exposure to fees by seeking quick settlement of the fee dispute.

Eliminating ambiguous provisions. Congress should eliminate as many ambiguities in the Act as possible. For instance, it should strike the provision allowing enhancement of fees when "a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." The enhancement provision breeds uncertainty, costs money to litigate, and makes settlement more difficult to obtain. In addition, Congress should amend 28 U.S.C. §2412(d) (2) to specify how courts should calculate the cost-of-living increase authorized in the Act. Congress should select the index upon which to base cost-of-living adjustments, and it should specify whether the cost-of-living increase should be calculated as of the date the work is performed, the EAJA application is filed, or the EAJA petition is granted. Litigation over these issues drains public funds without serving any compensating purpose. Finally, Congress should repeal the Act's 30-day filing deadline, 28 U.S.C. §2412(d)(1)(B), or at least change the Act's definition of "final judgment" in 28 U.S.C. §2412(d)(2)(G), to eliminate the inordinate amount of litigation over the timeliness of EAJA petitions. Currently, some district court remands to agencies are considered final judgments, thus triggering the 30-day filing limit in the EAJA, even though claimants do not yet know whether they have "prevailed" in the underlying action. Moreover, district courts do not always specify whether they intend to retain jurisdiction over remanded cases. Litigation over the timeliness of fee petitions saps resources of the litigants and judges without protecting any legitimate interest of the government--private parties have ample financial incentive to file for fees expeditiously without the spur of a jurisdictional filing deadline.

Introduction

Congress first waived the government's immunity from attorney fee awards under the Equal Access to Justice Act ("EAJA") in 1980[1] and reenacted the Act in 1985.[2] By authorizing courts to award attorney's fees to private parties of modest means who prevail in litigation against the United States, Congress sought two interconnected goals: to provide an incentive for private parties to contest government overreaching, and to deter subsequent government wrongdoing.[3] The United States has paid almost 2,000 EAJA awards in a typical year,[4] and its exposure extends to the thousands more cases each year[5] in which private parties prevail against the government in litigation in both courts and agencies.[6] Taxpayers thus underwrite millions of dollars in EAJA fees each year which, one hopes, has the impact--at least at the margin--of deterring government wrongdoing without overdeterring vigorous government enforcement efforts.

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[1] Pub. L. No. 96-481, 94 Stat. 2321, 2325-30 (codified at 28 U.S.C. §2412 and 5 U.S.C. §504).

[2] Pub. L. No. 99-80, 99 Stat. 183. As originally enacted, the Act included a 3-year sunset provision. President Reagan vetoed a legislative proposal to make the Act permanent in 1984 because of his opposition to two provisions, one which would have required the government to show that both its underlying position and position in the litigation were "substantially justified" to preclude fee shifting, and another that would have required the payment of interest by the United States on fee awards not paid within 60 days. Memorandum Returning Without Approval a Bill To Reauthorize the Equal Access to Justice Act, 2 Pub. Papers 1811 (Nov. 8, 1984). Legislation to extend the Act was subsequently reintroduced in Congress, and with several minor additions, this version was signed by the President on August 5, 1985.

The Act has since been amended twice, as part of the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874, 1948, and of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342, 3746.

[3] For the legislative history of the Act, see H.R. Rep. No. 1434, 96th Cong., 2d Sess. (1980); H.R. Rep No. 120, 99th Cong., 1st Sess. (1985); H.R. Rep. No. 1418, 96th Cong., 2d Sess. (1980); S. Rep. No. 253, 96th Cong., 1st Sess. (1979). The EAJA thus marks a departure from the so-termed American Rule of attorney's fees under which each party to a litigation bears its own fees. See generally Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975).

[4] The Administrative Office reported 412 cases decided in 1990 involving the EAJA. Annual Report of the Director of the Administrative Office of United States Courts (1990). See 28 U.S.C. §2412(d)(5) ("The Director of the Administrative Office of the United States Courts shall include in the annual report . . . the amount of fees and other expenses awarded during the preceding fiscal year"). But, as I discuss infra at text accompanying notes 114-15, the number approaches 2,000 if one counts all of the cases not reported to that office. There have been approximately 100 fee applications a year in agency cases as reported by the Administrative Conference of the United States. Report of the Chairman of the Administrative Conference of the United States on Agency Activities Under the Equal Access to Justice Act (Oct. 1, 1989--Sept. 30, 1990). The EAJA directs the Administrative Conference of the United States to provide to Congress information about individual awards and proceedings within each agency. 5 U.S.C. §504(e).

[5] Although the government's exposure is difficult to calibrate with precision, one Senate Report estimated that the government loses about 20,000 civil cases a year. S. Rep. No. 586,

To prevent overdeterrence, the Act provides that private parties who prevail against the United States in any nontort civil action[7] may collect attorney's fees against the federal government only if the government cannot demonstrate that its position was "substantially justified," which has been construed to require the government to demonstrate that its position had a reasonable basis in both law and fact.[8] The Act also precludes awards to large parties,[9] and includes a unique cap on fees which sets a maximum hourly rate, currently $75 an hour plus cost-of-living increases,[10] unless the court determines that "a special factor, such as the limited availability of qualified

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98th Cong., 2d Sess. 32 (1984) (estimating for 1983 and 1984). Fees are not available in some of those cases, and many of the prevailing parties obviously do not meet the eligibility standards in the Act. Nonetheless, the conviction remains that many private parties, for any number of reasons, are not utilizing the EAJA. See generally Mezey & Olson, Collecting Attorney Fees From the Federal Government: The Equal Access to Justice Act (discussing theories on underutilization) (manuscript on file with author).

[6] The Act covers certain agency as well as court proceedings. In 28 U.S.C. §2412(d)(3), the Act provides that fees may be awarded "to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5." Section 504 in turn provides that an adversary adjudication is one under Section 554 in which the United States' position is represented, but does not include a rate fixing or licensing proceeding. Although proceedings before agency boards of contract appeals are not adjudications under 5 U.S.C. §554, fees are available under the Act.

[7] The Act provides that any application must be filed "within thirty days of final judgment in the action." 28 U.S.C. §2412(d)(1)(B).

[8] Pierce v. Underwood, 487 U.S. 552 (1988). Fees are also precluded if the court finds that "special circumstances" would make an award unjust. 28 U.S.C. §2412(d). Findings of special circumstances have been rare, confined primarily to instances of misconduct by private parties or to instances in which eligible parties serve in essence as stalking horses for noneligible parties. See, e.g., Guste v. Lee, 853 F.2d 1219 (5th Cir. 1988).

[9] 28 U.S.C. §2412(d)(2)(B) ("'party' means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government or organization whose net worth did not exceed $7,000,000 at the time the civil action was filed . . .").

[10] Although agencies through rulemaking may also permit cost-of-living increases for EAJA fees in agency litigation, 5 U.S.C. §504(c)(1), none have done so.

attorneys for the proceedings involved, justifies a higher fee."[11] Fees can also be awarded to private parties, irrespective of the substantial justification of the government's position, "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award."[12]

The Act, however, is unlikely to accomplish the lofty goals set by Congress. In Part I, I address on a theoretical level the incentive scheme in the Act. First, in the majority of cases, the EAJA does not induce private parties to challenge governmental action because sufficient incentives to litigate already exist, and because the EAJA in most contexts provides only a weak incentive to sue. Although the Act does provide some incentive for private parties to bring small, strong monetary claims and strong claims for nonmonetary relief, the goal of equalizing the strength of the parties--by itself--does not persuasively justify continued operation of the Act. Raising the fee cap and repealing the substantial justification standard would go part way towards establishing more of a balance between the private party and government.

Second, the prospect of paying an attorney fee award has only limited impact on the government's primary conduct, even though the award is paid out of the offending agency's budget. Few agency officials consider litigation costs when crafting policy. Moreover, the government need not pay fees if it demonstrates that its position was substantially justified, and government officials will seldom consider that their own judgment might be considered *ex post* to be unreasonable. Eliminating the substantial justification standard might deter the government from continued conduct injuring private parties more effectively, at least in contexts in which the government official is likely to consider litigation costs before acting. Even with automatic fee shifting, it is doubtful that government officials will be chilled from acting or litigating vigorously for fear of exposure to an attorney fee award in light of other incentives to act. The fear of overdeterrence, moreover, is not acute given that most government actors subject to the EAJA are shielded by a safe harbor created by deferential standards of review.

Instead of serving as a means of monitoring governmental misconduct, the EAJA today functions primarily as a compensation measure to recompense small private parties for the often expensive and trying chore of litigating against the government. Because the government is only liable for fees when it is at "fault," *i.e.*, when it cannot demonstrate that its position was substantially justified, some would argue that the Act comports with notions of corrective justice.[13] The case for corrective justice, though plausible, is far from compelling. Congress, for instance, has never sanctioned one-way fee shifting (at least across-the-board) against large corporations in the private sector even when they are at "fault." And some might well believe that wrongdoing or fault at times is implicit in the government's failure to prevail in the underlying lawsuit, irrespective of the substantial justification of the government's position. Finally, viewing the Act as a corrective justice mechanism cannot explain why prevailing parties of sufficient means are ineligible for fees even when the government's position lacks substantial justification, and why the government cannot recover fees when a private party is at fault. Congress, in other words, has not evinced a consistent concern for corrective justice, and any aim of corrective justice in the Act is apparently tempered by distributional concerns, because the government and wealthy parties cannot recover fees.

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[11] *Id.* Enhancements, for instance, have been awarded to counsel who specialize in environmental issues. National Wildlife Fed'n v. FERC, 870 F.2d 542 (9th Cir. 1989). See generally infra text accompanying notes 180-84.

[12] 28 U.S.C. §2412(b). That waiver is tied to policies of specific statutes and therefore is outside the scope of this Article, which focuses on the desirability of general fee shifting against the government.

The substantial justification standard arguably impedes attainment of all three possible goals underlying the Act--it blunts private parties' willingness to litigate vigorously against the United States, undermines the deterrent effect of a fee award, and prevents some private parties who have suffered injuries at government hands from receiving full compensation for their injuries. Although the substantial justification standard might nonetheless be defended as a means to protect the federal fisc, I argue in Part II that the standard saves the federal government an unexpectedly modest sum of money. The government successfully defeats some fee applications on the ground that its position was substantially justified, yet the standard increases expenses in other cases because it makes settlement less likely and results in more complex fee litigation.[14]

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[13] Many commentators believe that, from a perspective of corrective justice, compensation should be awarded only in the presence of causation and fault. For the debate, compare Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987) (hereinafter Causation and Wrongdoing) with Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981), and Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L. J. 349 (1992) (hereinafter *Tort Law and the Demands of Corrective Justice*).

[14] Litigants are unlikely to predict with great accuracy whether courts will find the government position to be substantially justified. Courts have not construed the standard in an intuitive manner. For instance, courts have concluded that administrative action found to be arbitrary and capricious could nonetheless be considered reasonable, see Pierce v. Underwood, 487 U.S. 552 (1988) (concluding that a finding that an action was arbitrary and capricious cannot be equated with finding of no substantial justification). Courts have also held that the government is not substantially justified even when the underlying action had originally been upheld in court.

In Part II I also argue that the expense of administering the EAJA as a whole is significant. Taxpayers must not only at times pay the fees of private attorneys, but also the salaries of government attorneys and support staff, as well as those of judges and agency hearing officers. Based in part on a study of all EAJA applications resolved during the 12-month period from June 30, 1989 to June 30, 1990, I conclude that the overall costs of the EAJA, as currently constituted, are indefensibly high.

Finally, in Part III, I suggest possible improvements to the current statutory scheme. The normative allure of the suggestions depends on the goals sought to be accomplished in the Act.

First, if deterring government wrongdoing is the preeminent goal, then the EAJA should be repealed, to prevent needless waste of taxpayer dollars. The Act's failure to deter government misconduct effectively undermines the premise underlying its enactment, and government funds could be more productively allocated elsewhere. Second, and somewhat paradoxically, the Act could be transformed into an automatic fee shifting mechanism. Although far from compelling, there is some reason to believe that officials applying preexisting rules may internalize the cost of attorney's fees due to the close nexus between such decisionmaking and litigation. Moreover, there is arguably greater need to deter government officials making such fact-specific judgments due to the absence of internal political checks safeguarding enforcement choices. Converting to automatic fee shifting would augment the Act's incentive to private parties to bring suit on meritorious claims, and possibly deter government errors in some contexts. And eliminating the substantial justification standard, to many, would further a goal of just compensation. In addition, the empirical study suggests that the government is unlikely to lose significant amounts of money by switching to an automatic fee-shifting mechanism, unless such a change induces far more new applications for fees than I expect. Third, in the absence of more definitive data illuminating operation of the Act, some may well favor retaining the Act's current structure despite its costs and apparent lack of effectiveness. The status quo at least achieves a rough compromise between those advocating more aggressive measures to check government overreaching and those safeguarding the integrity of government programs and the public fisc.

Although the question of whether to repeal the Act, give it more teeth, or leave it untouched is perhaps close in most contexts, change to automatic fee shifting is compelling in individual benefits litigation, which comprises the vast majority of all EAJA disputes. Automatic fee shifting would provide incentive for parties to bring small, strong claims that might not otherwise

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See, e.g., Russell v. Sullivan, 930 F.2d 1443 (9th Cir. 1991); Smith v. O'Halloran, 930 F.2d 1496 (10th Cir. 1991).

attract counsel. Fee shifting would also lessen the temptation that private attorneys now have to bypass the EAJA and collect their fees from the back benefit awards to the detriment of their clients. At the same time, the deferential standard of review afforded individual benefits determinations minimizes the potential to chill conscientious governmental action.

Finally, irrespective of whether the substantial justification standard is retained, the Act should be revised to foster settlement and minimize the costs of EAJA litigation. For instance, to encourage settlement, Congress should authorize an offer of judgment device, modeled loosely on current Fed. R. Civ. P. 68, which would afford the government leverage to force settlement on the fee issues arising out of a losing case. To eliminate recurrent issues in litigation, the enhancement provision should be excised, the cost-of-living provisions made more specific, and the statute of limitations made easier to administer. Narrowing the scope of litigable issues under the Act should in turn promote settlement.

I. The Theoretical Case for the EAJA

To encourage suits and deter government wrongdoing, the EAJA adopts a one-way fee shifting mechanism enabling private prevailing parties--defendants or plaintiffs--to recover fees against the United States. Unlike other attorney fee statutes which shift fees to encourage suit in particular substantive areas,[15] the EAJA is unique in authorizing fee shifting across a wide gamut of cases, including all civil actions against the United States not sounding in tort. Congress designed the EAJA as a way to equalize the litigating strength between the government and private litigants of modest means.[16] Thus, both private plaintiffs and defendants are eligible for fees, but only if they satisfy the size restrictions in the Act.[17] From the perspective of those stated legislative goals, evaluation of the EAJA depends upon 1) the need to equalize the strength of the government and private parties to encourage those private parties to contest vigorously government overreaching; 2) the efficacy of fee shifting in accomplishing that goal; 3) the need for deterrence; and 4) the efficacy of fee shifting in deterring government errors in such civil contexts.

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[15] Congress has generally authorized one-way fee shifting as an inducement to enforce specific statutory policies. See, e.g., 42 U.S.C. §1988 (Civil Rights Act); 42 U.S.C. §1973l(e) (Voting Rights Act); Tile VII of the Civil Rights Act, 42 U.S.C. §2000(e)-5k; Title II of the Civil Rights Act, 42 U.S.C. §2000(a-3(b)) (employment discrimination); 5 U.S.C. §552(a)(4)(E) (Freedom of Information Act).

[16] For the legislative history, see supra note 3.

[17] Wealthy private individuals and large firms are therefore not eligible for fee shifting because there is unlikely to be an imbalance in resources. See note 9 supra.

Deterrence may arise either from the government's increased exposure to external review (by judges or agency hearing officers) or from its need to internalize the cost of paying fee awards.

Government conduct, however, is not monolithic, and the need for deterrence and the efficacy of fee shifting should be assessed with an eye to the important differences among government actions injuring private parties. A principal distinction lies in the difference between governmental policymaking of general impact and case-specific governmental determinations, whether in benefits cases, contract actions, or enforcement proceedings. "Policy" suggests a rule or practice of general applicability, preceded by deliberation, which is intended to set a model or guide for future conduct. In contrast, case-specific governmental action involves implementation of previously set policy or application of set policy to particular facts, with no necessary precedential effect.[18] To determine eligibility for grants and benefits, for example, government officials must determine whether private parties satisfy preexisting eligibility criteria, and to determine whether to mete out a fine, officials must decide whether a private party's conduct warrants the sanction.[19] Although the distinction may break down at the margins, much can be gained from separating governmental conduct into those two broad categories.[20] While the Act may provide a modest incentive to private parties to challenge government overreaching in both contexts, only in the case-specific categories such as enforcement will fee shifting even possibly compel the government to internalize the costs of its wrongdoing.

A. Equalizing the Strength of the Parties

The government can potentially utilize more resources in litigating than can private parties. Its sheer wealth may give it an unfair advantage in litigation, much like the advantage General Motors or Exxon can obtain over its smaller adversaries. Private parties may not be able to afford protracted litigation against the government, as plaintiffs or defendants, because of their comparative lack of resources.

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[18] Compare Londoner v. Denver, 210 U.S. 373 (1908) (hearing required to contest assessment of tax for individuals especially benefiting from improved roads); Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (hearing not required to challenge legislative determination to increase valuation of taxable property across the board). For discussion of the tenuous line between policymaking and case-specific application of law to fact, see infra text accompanying notes 131-38.

[19] For a discussion of the fact-specific decisions made by the IRS, see Zelenak, *Should Courts Require the IRS to be Consistent*, 38 TAX L. REV. 411, 412-15 (1985).

[20] The difference between policy and case-specific actions tracks the distinction between rulemaking and adjudication in the Administrative Procedure Act. See 5 U.S.C. §551(4) ("'Rule' means the whole or a part of any agency statement of general or particular applicability and future effect ..."; (7) ("'adjudication' means agency process for the formulation of an order.").

For instance, a pilot might not contest a small fine issued by the Federal Aviation Administration (FAA) in the absence of the Act unless collateral consequences (e.g., suspended license) make it indispensable to file suit irrespective of the cost. The FAA might prevail solely due to its size. Not only might that result be unfair, but it could have external effects as well, because many pilots may gain from a determination that the agency erred in issuing the fine in the circumstances. In other words, the public benefit in challenging a governmental action may not be reflected in the stake of one particular litigant. Especially if the evidence that small parties tend to be risk averse holds,[21] some meritorious claims will not be brought against the government, and some issues not fully aired merely because of the expected litigation costs.[22]

To what extent the government actually benefits from its size advantage is not clear. Many government attorneys are overworked and devote considerably less time to individual cases than do private counsel. On any given case, there may be one government attorney against several associates and a partner in a law firm. Even when private parties cannot afford law firms, the staffing may be equivalent. Nonetheless, some private parties plainly cannot afford to litigate in the same style as the government, and they may not pursue litigation against the government vigorously because of their lack of resources.

Assuming this lack of parity, the question remains whether the fee shifting in the EAJA restores the imbalance in resources between the private party of modest means and the government. An award of attorney's fees may provide a private party considerable incentive to challenge governmental regulation that it finds opprobrious or to defend against a governmental suit that it believes to be without merit. The impact of the EAJA is likely to be modest, however, given that so many private parties have ample incentive and means to challenge or defend against wrongful government conduct whether or not the prospect of fee shifting exists.

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[21] Rowe, *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139, 142 (1984, issue no. 1) (hereinafter *Predicting the Effects*).

[22] This relationship can be expressed algebraically: where p is the plaintiff's expectation of prevailing; a, plaintiff's legal fees, and x, plaintiff's estimate of judgment, then suit will be brought only when $px > a$. With one-way fee shifting, however, plaintiff would bring suit where $px > (1-p)a$, since there is a substantial likelihood that the government will have to pick up the tab for the attorney's fees. Under the EAJA, $(1-p)a$ must be redefined as $(1-r)a$, where r is plaintiff's expectation of prevailing in the fee litigation.

Most private parties who litigate against the United States, even those falling within the eligibility provisions in the Act, would in all likelihood contest government action just as vigorously whether or not their attorney's fees would be reimbursed. If the recovery could be significant, or if compliance with a governmental regulation would put the private party to great expense, then fee shifting would not be needed to ensure that suit is brought or defended to check governmental action, unless the party is without assets.[23] Companies would likely have incentive to challenge substantial fines levied under OSHA whether or not their attorney's fees could be reimbursed. Similarly, most contract claims before agency boards of contract appeals would be brought irrespective of the Act. Even if the private party cannot afford counsel at prevailing rates, it may well be able to attract counsel to pursue a monetary claim through a contingency fee arrangement. For instance, private parties seeking social security disability benefits may contract with counsel for up to 25% of the back benefits sought,[24] and thus most individuals with substantial claims can find competent counsel to represent them.

For nonmonetary controversies as well, there still may be adequate incentive for private parties to contest the governmental action. A private company may need to exonerate itself from a charge of violating a health regulation to maintain its good name and status in the business community. Or, the principle at stake--such as allowing a union to campaign on company property--may be of such obvious import to a company that the lack of money would not be an obstacle to challenging the governmental action.

Nonetheless, there are at least two primary categories in which the EAJA should theoretically encourage suits that would not otherwise be brought. First, the prospect of attorney's fees should encourage small, strong monetary claims.[25] Because of the costs of litigation, private parties may not sue if only a modest amount of money is at stake even when they have a substantial chance of winning. The smaller the claim, the greater the percentage of ultimate recovery firms or individuals need to expend on attorney's fees. A contingency fee arrangement may not suffice to ensure adequate counsel in such contexts, and will not suffice when the government is the moving party due to the absence of a financial carrot.[26]

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[23] Even if an affected business has few assets to devote to litigation, suits may also be brought by trade associations which sue on behalf of their members to contest governmental action. See, e.g., Love v. EPA, 924 F.2d 1492 (9th Cir. 1991); see also Note, *The Award of Attorney's Fees Under the Equal Access To Justice Act*, 11 HOFSTRA L. REV. 307, 317 (1982).

[24] 42 U.S.C. §406(b). If counsel are entitled to fees under both the Social Security Act and the EAJA, then they must refund the amount of the smaller fee to the claimant. Act of Aug. 5, Pub. L. No. 99-80, 99 Stat. 183, 186.

[25] Predicting the Effects, *supra note* 21, at 142. Schwab & Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 747 (1988) (hereinafter *Explaining Constitutional Tort Litigation*).

Consider the situation of a claimant with a $10,000 claim against the United States. That claim might not be brought--even if the private plaintiff estimated an 80% chance of success--if the attorney's fees could be expected to reach $8,000. On the other hand, with one-way fee shifting under the EAJA, claims will be brought even if the fees exceed $8,000[27] as long as there is a significant chance that the fees will be shifted to the government under the Act. A risk averse party might not bring suit if it believed it had a negligible chance to collect attorney's fees, but it likely would if it stood a 50% chance of recovering its own fees.

The Act similarly should afford private parties an incentive to bring suit, and defend against government claims, which are not readily monetizable. In particular, public interest groups benefit from the EAJA,[28] because there rarely

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[26] Fee shifting should encourage vigorous challenges to government policy not only by private parties who are plaintiffs but also those who are defendants. Just like plaintiffs challenging government policy, targets of government enforcement must decide how many resources to devote to defending against governmental enforcement efforts. Such private parties might need less encouragement since they have already been singled out as targets for enforcement. The prospect of recovering attorney's fees should nonetheless instill individuals and businesses with even greater resolve to contest what they believe to be government overreaching, particularly because they cannot benefit from contingency fees.

[27] There may be some distortion because fees under the EAJA are capped at $75 per hour plus cost-of-living increases.

[28] Although the evidence before Congress was largely anecdotal, Congress primarily wished to aid small businesses who lacked the means to challenge what was perceived to be arbitrary governmental conduct, whether they were plaintiffs or defendants. The EAJA was in fact appended to an act to aid small businesses in general. See, e.g., H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10 (1980) ("In fact, there is evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue. This kind of truncated justice undermines the integrity of the decisionmaking process"). See also 125 Cong. Rec. 21435-36 (July 31, 1979) (statements of Senators Culver, Dole); Award of Attorneys' Fees Against the Federal Government, Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary, 96th Cong., 2d Sess. 102-103 (May 20 and June 24, 1980) (statement of James D. McKevitt, Nat'l Fed'n of Independent Business). Indeed, some public interest groups like the ACLU originally opposed the Act on the ground that it might impede governmental regulatory efforts.

The congressional paradigm of a small business fighting opprobrious governmental regulation does not represent a typical EAJA claim, because of the prevalence of social security disability claims. Other claims are brought by individuals contesting license suspensions, fines, etc., and still others are brought by public interest groups such as the Sierra Club. Ironically, deregulation in the 1980s may have undermined the need for the EAJA, at least from the perspective of many small businesses who initially supported the measure. At the same time, public interest groups began to support the Act as evidence of its utilization by public interest groups grew. Still, there is sufficient incentive for any one plaintiff to expend its own resources on behalf of the public when little material recovery is possible.[29] The availability of fees thus makes litigation more likely, at least in the absence of a well-stocked war chest. Challenges to environmental threats, for instance, might not be brought but for the possibility of fee shifting.[30]

Yet for the EAJA to induce private parties to challenge governmental action, the private parties must be assured *ex ante* that they are likely to be able to collect fees. Private parties must not only assess the strength of their claims against the United States, but also gauge whether courts on review will find that the government's position had been substantially justified. Risk averse parties may rightly conjecture that, except in cases in which the probability of prevailing is quite high, they have little chance of recovering fees. Thus, the Act--at best--provides only a limited incentive for private parties to challenge perceived government wrongdoing. Nonetheless, the availability of fees in some cases--even if unexpected--allows public interest lawyers to bring nonfee generating claims as well. In other words, the EAJA to a limited extent subsidizes public interest attorneys, enabling them to conduct more litigation.[31]

Not surprisingly, fee shifting under the EAJA will not likely result in nuisance litigation. The $75 per hour maximum, even when expanded to account for the increased cost of living, is hardly sufficient to over-encourage suit. Moreover, the need to surmount the substantial justification standard also stands as a disincentive to frivolous litigation. Finally, in contrast to insurance companies or other repeat players in the private sector, the government will not likely settle weak cases for their nuisance value. The government has less incentive to settle than do such private parties because of political considerations against giving windfalls to undeserving claimaints, and because the government does not consider litigation costs as fully. No attorney can hope to get rich through the EAJA.

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is no question but that the EAJA currently benefits those small businesses who wish to contest continuing governmental regulation.

[29] Congress can of course provide more direct incentive for individuals to bring suit to redress injuries suffered by the public at large by authorizing such individuals to seek fines on behalf of the public and share with the government any recovery. See, e.g., 31 U.S.C. §3730 (providing for qui tam actions under False Claims Act).

[30] Nonetheless, fee shifting will induce few such cases to be brought. The prospect of fees is too uncertain to provide incentive to sue unless other incentives--funding through grants, *pro bono* policies at firms, or attorney preference--exist to enable the litigation to proceed.

[31] Whether the EAJA is efficient as a subsidy poses a difficult question beyond the scope of this report. As opposed to direct subsidies to legal aid offices, fee shifting directs subsidies only to those public interest groups who have achieved the greatest success in litigation.

In short, on a theoretical level, the EAJA furnishes some incentive for private parties to contest governmental action involving a modest sum of money or nonmonetizable issues, particularly when the chance of success on the claims is substantial. Small businesses and public interest groups are marginally more likely to contest governmental regulation if the prospect of fee-shifting exists.[32] Moreover, that incentive should not lead to the filing of frivolous lawsuits against the government. In that sense, the EAJA successfully redresses the imbalance of resources between the government and its smaller adversaries, but only on a very modest scale. Even then, the percentage of successful EAJA applications in which the original suit would not have been filed but for the Act is probably quite small.[33]

To equalize the litigating strength of private parties and the government further, fees recoverable under the EAJA could be increased to market rates,[34] and the substantial justification standard could be rescinded. Those changes would provide at least somewhat greater incentive to private parties to contest governmental action in more circumstances and with greater vigor. The number of additional suits filed and any increase in litigation resolve, however, would be difficult to predict and impossible to measure.

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[32] Groups qualifying for tax exempt status under 26 U.S.C. §501(c)(3) cannot, however, choose to pursue litigation merely because of the potential for a monetary award.

[33] Professors Schwab and Eisenberg have attempted to gauge whether passage of the Civil Rights Attorneys Fee Award Act of 1976, 42 U.S.C. §1988, served as a significant incentive for parties to bring more civil rights actions. They conclude, based on a representative study of filing rates, that attorney's fees "play a lesser role in civil rights litigation than one might expect." Explaining Constitutional Tort Litigation, supra note 25, at 755-759.

It is quite difficult to determine whether the EAJA, as an empirical matter, has encouraged more suits to be filed. The data collected by the Administrative Office are not specific enough to allow any reasonable inferences. From 1977 to 1978, for instance, the number of civil cases filed against the federal government increased 16%, and then another 19% the following year. After passage of the EAJA, the rate of increase in civil cases involving the government did not materially differ. Similarly, the number of government contracts cases that were filed by private parties actually decreased after passage of the Act--more cases were filed in 1977 than were in 1987 even though the number of civil cases filed against the government doubled. See the 1977 and 1987 Annual Reports of the Director of the Administrative Office of the United States Courts. In contrast, the number of social security determinations in court escalated exponentially after passage of the Act, but that increase is likely directly attributable to the government's aggressive policy of forcing beneficiaries off the social security rolls. There are just too many factors, in particular the change in administration, to derive any comfort one way or another from the figures. See the 1979-1990 Annual Reports of the Director of the Administrative Office of the United States Courts.

[34] That is currently the practice under the Civil Rights Act, 42 U.S.C. §1988, and the possibility of enhancements, though slim, exists. See generally Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 (1987) (narrow majority of court would allow enhancements for inability to obtain counsel in particular markets).

B. Prospect for Deterrence

Congress presumably did not wish to encourage vigorous litigation against the United States for its own sake, but to check government misconduct. If the government must pay attorney's fees for litigation when the government's underlying position[35] is not substantially justified, then it might use more care in the future, whether in deciding to litigate or in pursuing the underlying actions affecting the interests of private parties. Indeed, because any attorney fee award predicated on a lack of substantial justification must be paid out of the agency's own appropriated funds,[36] Congress hoped that the EAJA would provide the agency considerable incentive to avoid any situations in which its conduct might be assessed *ex post* to be unreasonable.[37] Deterrence might stem either from the EAJA's incentive to private parties to litigate against the United States and thereby expose its actions to judicial review, or from the government's need to pay attorney's fees if its actions are found to be unreasonable. Alternatively, a series of EAJA awards might signal Congress or the President that a particular agency required greater supervision.

But prior to determining whether fee shifting under the EAJA would encourage greater care, a critical preliminary question is to what extent such deterrence is needed. The case for deterring government wrongdoing through fee shifting in all nontort civil actions is far from compelling, for there is an arsenal of political checks which constrain governmental wrongdoing, at least in comparison to that in the private sector. In other words, the efficacy of fee shifting in deterring government wrongdoing can only be assessed in conjunction with other restraints upon the government. And, in any event, the prospect of fee shifting under the EAJA should only marginally contribute to deterring government misconduct.

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[35] 28 U.S.C. §2412(d)(2)(D). Before the 1985 amendments, many courts deemed "position" to refer to the government's position in court. See, e.g., United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481 (10th Cir. 1984); Spencer v. NLRB, 712 F.2d 539 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984). Construed in that manner, the Act deterred litigation misconduct (and misjudgment), but only indirectly the misconduct of policymakers. The congressional reenactment made it clear that the government's position is to include both the "position taken by the United States in the civil action" and "the action or failure to act by the agency upon which the civil action is based."

[36] 28 U.S.C. §2412(d)(4). In contrast, the government compensates parties who are eligible for fees pursuant to §2412(b) through the judgment fund. See Robertson & Fowler, *Recovering Attorney's Fees From the Government Under the Equal Access to Justice Act*, 56 TUL. L. REV. 903, 913-14 (1982) (hereinafter *Recovering Attorney's Fees*). In most cases the losing agency need not absorb litigation costs, since the Department of Justice serves as its litigator and costs are not apportioned to client agencies. Charging agencies for the cost of Department of Justice litigation might indeed promote more sensitivity to the costs of disputes with private parties, but it might also chill the agencies' willingness to contact and rely on the Department of Justice, at a cost of unified governmental policy.

[37] See generally *Recovering Attorney's Fees*, *supra note 36*, at 945-47. Most of the other academic literature focusing on the EAJA is highly descriptive.

1. Need for Deterrence

The EAJA is in part grounded on the congressional perception that government actors are inadequately deterred from misconduct by the political process. I doubt that anyone would challenge the Act's premise that government wrongdoing exists. Government wrongdoing, however, is likely to be less extensive than misconduct by firms (or individuals) in the private sector. Private firms are presumably motivated almost exclusively by profit, while the government in contrast (one hopes) acts in a broader public interest. Though the two at times converge, few question that the public interest at other times may be served by regulating firms in the private sector because of their potential for self-interested behavior. Yet Congress has not usually adopted one-way fee shifting against corporations.[38]

More importantly, the government's efforts in the public interest are checked by more than market forces and shareholder oversight.[39] An intricate web of political checks--including judicial review--safeguards the content of government policymaking and application of that policy to particular circumstances. Government agencies generally act only after considerable internal debate, and after interested private parties have a chance to influence the process. For instance, environmental policy regulating toxic waste dumps is usually set through notice-and-comment rulemaking, which gives agency staff and affected parties the opportunity to mold the eventual policy selected.[40] Even in the absence of notice-and-comment rulemaking, agency policy is formulated only after considerable debate and frequently after affording interested private parties an informal opportunity to contribute to the debate. In addition, congressional committees may well learn of key policy initiatives before they are implemented, and that knowledge enables Congress--or its agents--to gain some influence over the ultimate policy chosen. To the extent that Congress after the fact deems that an agency has selected unwise policy, it has the tools to force the agency either directly or indirectly to change such policy, and Congress remains at least somewhat accountable for its decisions--including whether to change agency policy--to the electorate.[41] In light of the political checks, therefore, government wrongdoing should pose *less* of a problem than wrongdoing in the private sector.

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[38] For exceptions, see the Sherman Act, 15 U.S.C. §15, Truth-in-Lending Act, 15 U.S.C. §1640, and see generally H. Cohen, Awards of Attorneys' Fees by Federal Courts to Federal Agencies, CRS Report for Congress (Nov. 29, 1989) (listing statutes).

[39] In light of their own financial interest, shareholders (or employees of companies) are unlikely to deter some kinds of corporate misfeasance.

[40] See, e.g., 42 U.S.C. §7410.

Similarly, government officials implementing previously set policy are subject to political checks, though the checks are not likely to be as effective as those confronting agency policymakers. Such government officials must determine how to apply broad policy set by Congress or other agency officials. In contrast to officials making policy choices, officials implementing policy in fact-specific contexts generally act without the benefit of participation from the public. Moreover, fact-specific application of policy--whether in enforcement or benefits contexts--rarely grabs Congress' eye, unless an agency targets an influential constituent. Some enforcement decisions, however, are prefaced by considerable debate or at least examination within the agency,[42] and generally only relatively senior agency officials have the authority to approve significant affirmative litigation.[43] Agencies have also placed controls on officials making benefit determinations to ensure as much consistency as possible.[44] Even before judicial review, therefore, the political process to some extent molds executive implementation decisions as well as policymaking itself.[45]

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[41] That accountability, however, is admittedly attenuated, which is one reason why commentators have roundly condemned broad delegations of congressional authority to agencies. See, e.g., J. Ely, Democracy and Distrust 130-34 (1980); T. Lowi, The End of Liberalism: The Second Republic of the United States 92-126 (2d ed. 1979); Aronson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 21-37 (1982).

[42] There are checks within the agency in the benefits context as well. See Mathews v. Eldridge, 424 U.S. 319 (1976) (describing the process by which determinations to terminate disability benefits are reached); see also 20 CFR §§404.900-404.906 (1991) (detailing steps in termination decision).

[43] The Assistant Attorney General for the Civil Division, for instance, must approve each case filed under the False Claims Act which seeks over $500,000. 28 CFR Pt. O, Subpt. Y §4(c)(5) (1991). The General Counsel of the SEC must review all enforcement cases prior to suit. 17 CFR §200.21 (1991).

[44] The Social Security Administration ("SSA") in the 1980s attempted to exercise greater control over decisionmaking by administrative law judges by demanding greater productivity from each judge and attempting to achieve more consistent results. The SSA instituted a peer review program whereby SSA's Appeals Council reviewed certain ALJ determinations on its own motion. SSA's efforts engendered considerable controversy. See generally Pierce, *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron & Mistretta*, 57 U. CHI. L. REV. 481 (1990).

The political checks constraining government officials' discretion at times deter government wrongdoing, and were designed for that very end.[46] This is not to suggest that we should automatically trust what agencies do, and judicial review is an essential complementary check upon government conduct. The political checks, however, minimize the need for oversight through private actions, at least in comparison to oversight of private decisionmaking,[47] since some other mechanism is in place to force accountability. And, in particular, the need to force the government to internalize the cost of its adversaries' attorney's fees is questionable when both internal political checks and the external check of judicial review act in concert to monitor governmental conduct. Yet, while Congress has not seen fit to deviate from the American rule that each side bear its own attorney's fees in most situations in the private sector, it has authorized fee shifting against the government.

2. Effect on Deterrence

Irrespective of the need to check governmental misconduct, there is little reason to believe that the path chosen by Congress in the EAJA will be at all successful. First, little deterrence can be expected to arise from the EAJA's arguable inducement to private parties to contest governmental action. Even in the absence of the EAJA, government decisonmakers recognize that the prospect of suit and external review exists. Indeed, given our litigious culture, it would be surprising if a government policymaker did not anticipate that somewhere down the line that policy could be challenged in a lawsuit. Moreover, there is a distinct possibility that targets of enforcement action or disappointed benefits claimants will seek review of the relevant government determinations either within the agency or in courts. To be sure, some policy might not be challenged in the absence of fee shifting, and some enforcement decisions might not be as vigorously contested; but because government decisionmakers will not know which policies or enforcement decisions will go unchallenged, they must consider the possibility of a lawsuit in every case.

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[45] Cf. Heckler v. Chaney, 470 U.S. 821, 831-32 (1985) (discussing political decisions underlying agency enforcement decision).

[46] Krent, Reconceptualizing Sovereign Immunity (on file with author).

[47] My point is not that the political checks provide optimal deterrence, only that such checks do not operate in the private sector. Private decisionmaking, though, is checked to a certain extent by the prospect of government regulation. Corporate managers recognize that any controversial misstep that results in public indignation may induce government regulators to act. But the force of that check is uncertain, and the government is likely to intervene only in particularly egregious contexts.

The extra inducement of litigation provided in the EAJA, therefore, is unlikely to serve as a substantial *ex ante* check upon government decisionmakers.

Second, the prospect of paying attorney's fees should act as a weak deterrent at best. Government policymakers rarely consider the possibility of attorney's fees when formulating government positions. It is ludicrous to think that officials at NHTSA or the EPA consider the potential financial impact from an adverse attorney fee award in setting seat-belt policy or effluent standards, any more than Congress would consider litigation costs in enacting broad social policy. As a general matter policymakers do, or at least should, consider the cost-benefit justification of the policy they pursue.[48] Yet, given the separation in most agencies between policymakers and litigators, consideration of posssible attorney fee awards is not likely to be of significant concern to policymakers. For instance, in setting car safety standards, NHTSA must recognize the possibility of a legal challenge, but it also recognizes that the Department of Justice will handle the litigation at no charge to the client agency.[49] This is not to suggest that agency policymakers are not aware that litigation costs the government money, only that full internalization is unlikely given that the current costs of litigation are not even quantified, let alone deemed attributable to the actions of certain agency policymakers.[50]

Moreover, the prospect of a substantial attorney fee award is quite remote. Few government policymakers consider it likely that their policy will be set aside upon judicial review, let alone that it could be considered *ex post* to be unreasonable. Nor would policymakers necessarily be aware of whether successful challengers to government policy would qualify under the eligibility standards in the Act. In any event, an attorney fee award is likely to be trivial, or at least quite modest, in comparison to the financial and social goals to be advanced by government-wide policy.

Finally, an attorney fee award is not likely to be an effective deterrent to government misconduct in view of the large gap in time between formulation of government policy and award of attorney's fees. Litigation challenging governmental action may span years, particularly if the court remands the case back to the agency for further consideration. Even in the absence of remands, litigation over several years is not out of the ordinary. In addition, the attorney fee litigation may span several more years.[51] From start to finish, therefore, the challenge to governmental policy will likely last at least a couple of years, during which political administrations or at least agency personnel might change. The lessons of an attorney fee award are likely dissipated, if not lost, with the passage of time, and they can easily be rationalized (if one would care to) as the result of an ineffective or incompetent precursor in office.

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[48] Executive agencies, pursuant to Executive Orders 12291 and 12498, must present proposed rules to the Office of Management and Budget for review in part to ensure that agencies have undertaken cost-benefit analyses in proposing the rules. See generally Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989).

[49] See note 36 supra.

[50] Requiring government attorneys to record their time and then collating the data to estimate litigation costs in selected cases might represent a significant step in forcing government attorneys to be more aware of the costs arising from their conduct of government litigation.

Nonetheless, federal agencies that implement policy directives by assessing the facts of each particular case are somewhat more likely to be deterred by the prospect of an attorney fee award. Such agency personnel must determine how to apply broad rules in fact-specific situations. Because those making implementation decisions more frequently consider litigation costs, there is a greater likelihood that consideration of potential attorney's fee liability, at least at the margins, will encourage agency personnel to proceed with greater caution. The prospect of litigation costs might make the FAA pause before levying a small fine against a pilot under a novel theory of culpability.[52] And in general, there is less money at stake in such contexts so that the costs of enforcement are likely to be considered more fully.[53]

Consider, for instance, the Department of Justice's Section on Civil Frauds. In determining whether to sue under the False Claims Act,[54] officials must not only consider the likelihood of success and potential recovery, but also the costs of litigation, in terms of government employee time and potential exposure to attorney's fee awards. It may be that the suit is so politically important (as for instance some suits against defense contractors or against former savings and loan directors) that cost is irrelevant, or it may be that suit is necessary as a test case notwithstanding the expense. In addition, even a costly suit may be cost effective in the long run because it may deter future false claims against the government. Nonetheless, such enforcement groups have limited funds, and the prospect of an attorney's fee award may have some added deterrent force.

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[51] Much attorney's fee litigation, of course, lasts longer than the underlying litigation itself. See Hensley v. Eckerhart, 461 U.S. 424 (1983); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980).

[52] Small business groups have charged that government agencies, to project the image of an aggressive watchdog, at times padded their enforcement record by filing actions against small companies hoping that such companies do not have the resources to defend themselves adequately. See note 28 supra.

[53] Moreover, although some enforcement actions (such as NLRB unfair labor practice charges) span as much time as challenges to agency policy, on the whole, there is likely less of a time gap between the case-specific implementation of policy and the judicial resolution of any subsequent challenge.

[54] 31 U.S.C. §3730.

Consider as well agency officials making case-by-case determinations of benefits eligibility. The prospect of an adverse attorney's fee award in addition to litigation costs might prompt the officials to take more care in resolving contested issues under the Act. From a cost-benefit perspective, it might be financially prudent to grant benefits to claimants who have a strong claim to eligibility because, irrespective of the ultimate result, the cost of any necessary litigation might eclipse the amount saved in denying benefits. Still, the substantial justification standard largely removes concern for attorney's fees because officials who deny benefits in close cases are unlikely to consider that their actions could later be determined unreasonable.[55]

Finally, the EAJA might help deter agency wrongdoing by alerting Congress or the President to a wayward agency. A series of EAJA awards might signal something amiss. Yet a signaling function can only operate if there is sufficient information available to the watchdog. Only the Department of Health and Human Services has a significant enough EAJA caseload (approximately 2,000 cases a year) from which any conclusions can be drawn. In the target year, for example, the Department of the Interior was the second most active agency in court cases, losing five out of the seven fee disputes resolved.[56] The Armed Services Board of Contract Appeals, which granted 13 applications in the last fiscal year,[57] had the most active caseload arising out of agency adjudications. Such data, particularly because of the unique fact patterns among the cases, provide little grist for any oversight committee or agency. Thus, even if congressional or executive overseers would consider EAJA awards as a barometer of agency performance--an assumption which anecdotally is not borne out--there are inadequate statistics upon which any judgment can be made.

A caveat, however, is in order. Even if the EAJA does not signficantly deter careless government policy or implementation decisions, it may help deter litigation misconduct. In cases in which the private parties have prevailed or are likely to prevail at the trial court (or agency) level, there are perhaps insufficient checks upon government litigators to prevent delay. Judgment, for instance, need not be paid until "final," and finality under the judgment fund statutes means when all possible remedies are exhausted.[58] Thus, the more the litigation is protracted, the less the compensation for the private parties, and fees need not be paid until subsequent judgment under the EAJA. Particularly for attorneys who rely upon government litigation for their livelihoods, the delays of possibly years before receiving compensation can be quite devastating. An award of attorney's fees therefore plausibly ensures that government litigators do not needlessly protract litigation, for if they do, the penalty may be a greater award of attorney's fees.

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[55] See text accompanying notes 62-63 infra. In addition, the EAJA awards may comprise such a small percentage of the total benefits awarded that any deterrence from the award is unlikely. See note 145 infra.

[56] Annual Report of the Director of the Administrative Office of the United States Courts (1990).

[57] Report of the Chairman of the Administrative Conference of the United States on Agency Activities Under the Equal Access to Justice Act (October 1, 1989--September 30, 1990).

Predicating the EAJA on the need to police government litigation tactics is not fully satisfying, however. An award of fees for the underlying litigation seems overbroad if all that is at stake is dilatory tactics. Although I doubt that such misconduct is widespread, sanctions may be appropriate--and have been awarded--for such litigation misconduct,[59] but litigation sanctions independent of the EAJA should be sufficient.[60]

As an overall means to deter government misconduct, therefore, the EAJA is quite problematic. In comparison to the private sector, most government policymakers are likely to be less concerned with cost-benefit analysis and thus less likely to internalize the extra costs represented by the attorney's fee award. Those costs in any event are probably trivial in comparison to the economic or political value of the governmental policy. Furthermore, the political checks already facing most government decisionmakers diminish the need for the added deterrence of EAJA awards, particularly given the possibility of judicial review.[61] Still, one cannot totally discount the potential for deterrence, and the prospect of attorney's fees may have a modest deterrent impact upon those government decisionmakers who must decide how to implement government policy in fact-specific contexts, because they are more likely to assess the potential litigation costs arising from an enforcement action or denial of a government benefit. And such decisionmakers, in contrast to government officials formulating general policy, face comparably fewer internal checks prior to reaching their fact-specific decisions.

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[58] See 31 U.S.C. §1304(a); 28 U.S.C. §2414. But cf. Trout v. Garrett. 891 F.2d 332 (D.C. Cir. 1989) (despite judgment fund limitations, interim attorney's fees permissible in certain situations); Rosenfeld v. United States, 859 F.2d 717 (9th Cir. 1988) (same).

[59] Some courts have held that sovereign immunity does not block sanctions under Rules 11 & 37 of the Rules of Civil Procedure. See, e.g., Mattingly v. United States, 939 F.2d 816 (9th Cir. 1991); United States v. Gavilan Joint Community College District, 849 F.2d 1246 (9th Cir. 1988).

[60] Indeed, the EAJA formerly accomplished that goal more narrowly when the "position of the United States" was interpreted to refer to its position (and thus its conduct) in the litigation itself. See, e.g., Spencer v. NLRB, 712 F.2d 539 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984). Fees could be awarded, not if the underlying action was arbitrary, but if the government's litigation tactics were suspect. See also note 35 supra.

[61] The preceding discussion suggests that fee shifting under the EAJA has not overdeterred government policymaking. Government officials have been chilled neither from formulating policy nor from pursuing aggressive enforcement measures for fear of incurring attorney's fee liability. Thus, as currently constituted, the EAJA does not have a deleterious impact upon government policy. Indeed, awards under the EAJA have been substantially lower than the Justice Department originally projected. The Department, as well as the Congressional Budget Office, estimated that the Act would cost taxpayers over $100 million a year. H.R. Rep. 1418, 96th Cong., 2d Sess. 20 (1980). In contrast, the Administrative Office and Administrative

Although the prospect of effective deterrence through fee shifting is slim, rescinding the substantial justification standard would marginally increase deterrence of future errors by subjecting the government to attorney's fee awards in all cases in which a private eligible party prevails. In the absence of the substantial justification standard, fee awards would become more certain, and the government's exposure to fees greater. Similarly, elevating the fee cap could augment deterrence slightly by forcing the government more fully to internalize the costs of its wrongdoing, but the same structural impediments to more effective monitoring remain.

3. Potential for Overdeterrence

Given that fee shifting under the EAJA will not likely deter government actors at all, any fear of overdeterrence is seemingly misplaced. The substantial justification standard plainly protects against overdeterrence by creating a significant cushion for government conduct--only when the government's position lacks substantial justification need the government fear an EAJA award. Indeed, Congress included the substantial justification standard to assuage administration fears of chilling effective governance.

Even without the substantial justification standard, however, the EAJA would not likely result in overdeterring government activity. Eliminating the standard would raise the stakes for government policymakers and litigators. Automatic fee shifting is akin to a tax upon losing, and in close cases, government attorneys may decide not to bring a case, or to launch a new jurisdictional argument, for fear of incurring greater fees. As discussed previously, the prospect of fees will not likely deter policymakers, but officials making fact-specific determinations may be affected at the margins. Elimination of the substantial justification standard likely would make such officials more concerned with the prospect of attorney's fees.

The line between effective deterrence and overdeterrence is of course hard to draw, and it is not amenable to any definitive empirical analysis. As with

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Conference together have reported payouts of only several million dollars a year. See text accompanying notes 105-17 infra. Even if that figure underrepresents the amounts that have been paid, such amounts do not even come close to that originally projected.

questions of deterrence and incentive to sue, the potential for overdeterrence depends upon the nature of the litigation. To the extent the underlying liability standard incorporates a measure of wrongdoing, there is less likely to be overdeterrence. For instance, agency officials awarding benefits may not take into account the political affiliation of the claimants. A successful challenge to a denial of a claim hinges upon proof of impermissible motivation by the agency. Because agency officials should never consider the political affiliation of a claimant, the prospect of fee liability will not likely hinder their actions in determinining eligibility on the basis of recognized criteria. In other words, there is at times little reason to encourage agency actions at the margins of the law.[62] Department of Justice officials contesting false claims against the government, however, are not protected by any fault standard--the claim depends only upon whether the evidence satisfies the statutory standards, and a reasonable construction of the statute or of the facts of the case does not ensure success.[63]

Moreover, there is less risk of overdeterring government agencies when their actions are protected by a deferential standard of review. Standards such as "substantial evidence in the record" or "arbitrary and capricious" create a safe harbor for agency officials implementing policy at the outskirts of their authority. Officials who recognize that their decisions will be sustained by substantial evidence in the record will not readily be overdeterred by the prospect of fees because of the margin of safety created by the deferential standard.

The potential for overdeterrence thus varies in each context in which the EAJA applies. The risk of overdeterrence is greatest when the government's underlying liability is predicated on conduct that is not clearly "wrongful" and that is not protected by any deferential standard of review. Enforcement actions provide an example--courts must decide not whether the government acted wrongfully in bringing suit, but whether all provisions in the Act were satisfied. Nonetheless, government officials may have sufficient nonmonetary incentives in bringing enforcement actions or contract claims to negate the potential for overdeterrence. Such government officials would realize that, even if there is a risk of paying fees when trying to set new precedent, overturn old, or set an example for other private parties, those goals should be well worth the modest price.

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[62] Cf. Rich, "Denial of Benefits to Blacks May Signal Bias, GAO Says," Wash. Post A17 at col. 1 (May 12, 1992) (GAO study unearthed disparities in agency determinations of eligibility for social security benefits).

[63] See, e.g., Crandon v. United States, 494 U.S. 152 (1990) (rejecting government suit to recover for false claims despite plausible reading of statute); see also United States v. Boeing Co., 747 F. Supp. 319 (E.D. Va. 1990) (awarding private party's EAJA claim in same case), rev'd, No. 90-3510 (4th Cir. March 3, 1992).

Converting to an automatic fee shifting system might nonetheless chill government attorneys' efforts in the underlying litigation. Attorneys would recognize that novel jurisdictional or statutory arguments come with a price, namely that unsuccessful arguments raise the amount of attorney's fees paid to prevailing private parties. Yet, if the amount or principle at stake in the litigation is significant enough, and the arguments are plausible, government attorneys should have ample incentive to litigate as vigorously as possible. Government attorneys could also protect themselves by launching such new arguments in cases in which they stand little chance of paying EAJA fees, either when the private party does not satisfy the eligibility criteria in the Act, or when the government stands an excellent chance of winning on other grounds. The burden of defending against such arguments would not therefore rest on the shoulders of prevailing private parties of modest means.

Irrespective of the impact on the underlying litigation, converting to automatic fee shifting plainly will not overdeter government attorneys from raising creative arguments in the fee litigation itself. The purpose of streamlining the EAJA would be to remove much of the need for "creative" arguments, because in the vast majority of cases only the reasonableness of hours expended would be at stake. In any event, a switch to automatic fee shifting would not overdeter government litigators more than they are already, due to the prevailing parties' current entitlement to fees for successful fee litigation, irrespective of the reasonableness of the government's arguments opposing the fee award.[64]

In short, while the prospect of overdeterrence exists, the prospect is neither certain nor that daunting. Overdeterrence is unlikely if a deferential standard of review protects the government decisionmaker, or if there is little positive benefit to be derived from governmental conduct at the margins of the law. Moreover, there should be little fear of deterring novel governmental arguments in the underlying litigation as long as the litigation is important enough. Finally, there should be no impact whatsoever on the conduct of the fee litigation itself. Thus, although the substantial justification standard has some effect in protecting against overdeterrence, its role is modest at best.[65]

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[64] See text accompanying notes 97-98 infra.

C. Compensation Role

Although the EAJA may have only limited success in encouraging suits and deterring government wrongdoing, it plausibly serves to compensate more fully some parties who are injured by the government. There is certainly normative appeal in providing that those injured by government wrongdoing receive compensation. Many have noted that compensation for injuries, whether inflicted by governmental or private agents, is hardly complete when a substantial chunk of that award may go towards attorney's fees.[66] But compensation under the EAJA is quite limited, applying only to those 1) satisfying the eligibility standards in the Act; 2) who have prevailed in litigation against the United States; and 3) against whom the government cannot demonstrate that its position was substantially justified. While the Act thus plainly eschews any general compensation goal,[67] the restrictions can in part be explained by notions of corrective and distributive justice.

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[65] If the EAJA were applied more broadly to include all agency proceedings, a different type of overdeterrence might ensue. Many agency proceedings are informal, reflecting more of a magisterial than an adversarial approach. In disability determinations before ALJs, for instance, there is no attorney representing the position of the Secretary. To apply the EAJA to such proceedings could change the nature of the proceedings dramatically, because the government would logically treat the proceedings more like trials to limit its exposure to attorney's fees. For instance, the government might prevent the claimant from introducing new evidence at a hearing to restrict his or her chance to prevail. Thus, the current line between adversarial and nonadversarial adjudications in the EAJA makes sense, to preserve the integrity of informal agency processes. Recognition of the necessity of a line, however, does not shed light on the current controversy over where to place the line.

The Supreme Court recently concluded that only agency proceedings technically governed by 5 U.S.C. §554 fell within the scope of the Act, even if the agency by statute was required to utilize the same procedures as under Section 554. Ardestani v. INS, 112 S. Ct. 515 (1991) (relying in part on canon of strictly construing waivers of sovereign immunity to conclude that immigration proceedings not covered because they are not "under" §554). If Congress is convinced of the Act's success, then it should consider, on a category-by-category basis, whether to extend the Act to proceedings required by statute which are substantially similar to those under Section 554.

Similarly, Congress may wish to revisit the issue of which proceedings in Article I courts should be covered under the Act. Although Congress explicitly included litigation in the Claims Court in reenacting the Act in 1985, 28 U.S.C. §2412(d)(2)(F), it has left the status of other Article I courts unresolved. For instance, the Court of Veterans Appeals, which was established after the latest reenactment, held that it lacked authority to award attorney's fees under the Act. Jones v. Derwinski, No. 90-58 (March 13, 1992).

[66] See, e.g., Leubsdorf, *Recovering Attorney Fees as Damages*, 38 RUTGERS L. REV. 438, 442-44 (1986); II Rowe, *Enterprise Responsibility for Personal Injury* (ALI Reporter's Study) (hereinafter *Enterprise Responsibility*).

1. Corrective Justice and the Requirement of Fault

There is currently no consensus as to whether notions of corrective justice require a losing party in litigation to pay the attorney's fees of its adversary. On the one hand, if a prevailing party can recover her doctor bills, it is not clear why she cannot recover her attorney's fees, since both generally represent out-of-pocket expenses. On the other hand, attorney's fees perhaps can be distinguished on the ground that all of us in society have agreed to bear the risk and hence costs of litigation--unlike medical bills--irrespective of whether we prevail. In the long run, we may be successful litigating as often as we lose. The persistence of the American Rule of attorney's fees, under which each side must bear its own litigation costs, plausibly reflects such an understanding.[68]

Assuming that payment of attorney's fees is ever consistent with principles of corrective justice, fee shifting might be appropriate in two contexts. First, fee shifting plausibly could be required whenever a party's position in litigation is wrongful. Most courts interpreted the EAJA in that fashion prior to the 1985 reenactment.[69] Second, fee shifting might alternatively be required whenever the losing party's underlying conduct is "wrongful,"[70] or otherwise gives rise to a duty to compensate under principles of corrective justice.

To some, the EAJA may be normatively attractive in requiring the government to pay attorney's fees as damages whenever the government is at fault in forcing a private party to litigate to vindicate its interests. From the perspective of corrective justice,[71] that element of fault arguably supplies the necessary condition to support an award of fees. The substantial justification standard, in other words, limits payment of attorney's fees to those contexts in which the government's position either in the underlying action or in the litigation itself lacks a reasonable basis in law and fact.

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[67] Indeed, because many tort victims (as well as others) cannot recover at all against the United States because of the lingering doctrine of sovereign immunity, see, e.g., 28 U.S.C. §2680(a) (listing exceptions to waiver of liability under the Federal Tort Claims Act), the case for more fully compensating parties through the EAJA, who have already obtained some relief, is far from compelling.

[68] The EAJA poses an anomaly because those injured by the government stand in the same shoes as would any prevailing party under the American Rule on attorney's fees, whether plaintiff or defendant. Although Congress at times has permitted fee shifting in other contexts, such as under the Truth in Lending Act, 15 U.S.C. §140(a), most prevailing parties--irrespective of the size of their adversaries--cannot collect fees even after prevailing.

[69] See note 35 supra.

[70] The same difficulty in justifying recovery based solely on compensation exists in the general negligence standard in torts. See generally P. Huber, Liability: The Legal Revolution and its Consequences (1988); R. Posner, Economic Analysis of the Law 187-90 (3d ed. 1988); Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 951-52 (1981).

To others, however, wrongdoing may not be synonymous with lack of substantial justification. First, the government's failure to prevail in litigation might itself reflect fault. Private parties can prevail against the government at times only by surmounting the hurdle of deferential review under the APA--the arbitrary and capricious or the substantial evidence test--which incorporates a standard of wrongdoing.[72] Corrective justice principles might therefore require compensation whenever a government policy is invalidated as arbitrary, or an agency adjudication overturned because of the lack of support in the record.

Second, some might believe that corrective justice requires compensation not only when the government is at fault, but when the loss itself is wrongful. Compensation may be owed, for instance, when the government erroneously withholds benefits (and enjoys the use of the money), or deprives private parties of other entitlements, irrespective of its good faith.[73] Because corrective justice notions rely so heavily on individual intuition, it is difficult to say with any confidence whether the compensation scheme in the EAJA--or in fact, any fee shifting mechanism--is consistent with corrective justice principles. The decision to limit fees to instances where the government fails to demonstrate substantial justification is perhaps plausible, but by no means compelled, from a perspective of corrective justice.

Moreover, whatever one's view of the justice of requiring the government to pay attorney's fees when its position was not "wrongful," the Act as a whole does not reflect a consistent application of corrective justice principles. First, the "fault" standard is not reciprocal, the government cannot obtain fees when it prevails in litigation when the private party was at fault. Second, wealthy private litigants cannot obtain fees even when the government's position is not substantially justified. Large parties, just like smaller ones, arguably deserve compensation if they are injured by government misconduct.[74]

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[71] See, e.g., Causation and Wrongdoing, supra note 13; Jeffries, *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82 (1989).

[72] At other times, private parties can prevail only if a reviewing court determines that the agency's construction of a statute is unreasonable. Chevron, USA v. Natural Resources Defense Council, 467 U.S. 837 (1984). Doctrines of deference, in other words, may ensure that agency action is overturned only when the agency has been at fault.

[73] Cf. Tort Law and Demands of Corrective Justice, supra note 13. Compensation might not be required, however, for enforcement actions filed by government agencies which fail because reasonable enforcement initiatives do not disturb any entitlement of the target.

2. Distributive Justice

To the extent the EAJA reflects a principle of corrective justice, that principle is apparently tempered by distributive concerns. Private parties need not pay fees when their actions have been without substantial justification. Moreover, the Act also excuses the government from paying fees when the private parties are wealthy, despite the wrongfulness of the government's conduct. The Act therefore plausibly furthers distributive goals in shifting fees only when the party injured has relatively few resources.

Finally, whether or not a compensatory goal represents sound policy, the Act, as I will discuss, implements that goal in an ineffective manner because so much of the expense involved in administering the EAJA goes not to injured parties but instead must be used to pay government attorneys, government decisionmakers, and private attorneys. Thus, the case for maintaining the EAJA as a corrective justice mechanism, molded by distributive concerns, is questionable.[75]

In short, the EAJA as currently constituted serves an amalgam of functions, none very effectively. The Act equalizes the strength of the parties, but only a little, does not likely deter government wrongdoing, and serves to compensate partially some victims of government misconduct. Repeal of the substantial justification standard would augment the effectiveness of the Act on at least the first two fronts, and it might help on the third depending upon one's view of corrective justice.

II. Costs of EAJA Litigation

Although the EAJA's record in encouraging more vigorous litigation against the United States, deterring government overreaching, and satisfying the demands of corrective justice may be uncertain, its costs are quite tangible.

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[74] Moreover, the $75 per hour fee cap undercuts a compensation goal, because it undercompensates attorneys representing private parties in government litigation in most markets in the country.

[75] Nonetheless, the EAJA currently may serve a salutary function in creating the appearance of fairness. Some may believe that injuries at the hands of government officials are somehow "worse" than those received at the hands of private parties, presumably because of the breach of public trust involved. In any event, it is quite difficult to gauge whether enactment of the EAJA has contributed to a greater sense of well being among small regulated businesses or private individuals, and if so how to measure that contribution against the costs to the taxpayer.

The one-way fee shifting under the EAJA increases the burden on the taxpayer in a number of ways, all of which are exacerbated due to the substantial justification standard. First, in comparison to the American Rule under which parties bear their own litigation costs, the potential for fee shifting likely makes settlement of the underlying action more difficult to accomplish, and thereby increases expenses the taxpayer must foot for the initial litigation with the government. As discussed below, repeal of the substantial justification standard would likely facilitate settlement of both the underlying case and the fee dispute. Second, the EAJA adds a new layer of costs by introducing an additional round of litigation which generates more fees for government and private attorneys, and more adjudicative expense in courts and agencies. Repeal of the substantial justification standard, even if it would not induce settlement, should streamline the fee litigation. Although the government has defeated some large fee requests on the ground that its position had been substantially justified,[76] litigation over that standard in other cases has probably cost the government almost as much money as it has saved.

A. Impact on Settlement

Theoretically, the EAJA should make the underlying dispute with the government more difficult to resolve. The likely disagreements over whether liability for fees exists and over the amount of attorney's fees that would be recoverable augment the odds that the parties cannot come to an amicable agreement of the underlying suit.

In the absence of the EAJA, private parties litigating against the government will likely settle if their expected recovery is less than the government's expected loss or if their expected loss is greater than the government's expected gain. Viewed another way, the parties will likely settle if plaintiff's estimate of the expected judgment exceeds defendant's estimate by less than the sum of their anticipated legal costs.[77] Obviously, there are pragmatic reasons why settlement may not occur even under these circumstances--whether because of precedential value, strategic bargaining, lack of information, etc.--but many cases will settle, particularly if they involve financial issues with little systemic impact. Assuming risk neutrality (and insignificant settlement costs), the governmental and private parties will determine whether to settle by discounting the possible outcomes of their litigation by their probability of success.[78] For instance, if plaintiff has a $10,000 claim against the government and an 80% chance of prevailing, and anticipates expending $4,000 in legal fees, its expected gain is $4,000. Assume that the government litigator believes that it has a 40% chance of losing, and estimates its costs in terms of resources expended at trial to be $2,000. The government therefore likely will lose $6,000 from the litigation, and the difference between plaintiff's expected gains of $4,000 and the government's expected loss of $6,000 creates a "positive" bargaining range of $2,000 in which both parties have the incentive to settle.[79] The incentives to settle when the government is plaintiff should be identical.

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[76] During the target year, for instance, the government demonstrated that its position had been substantially justified to defeat an EAJA request for $233,804, Annual Report of the Director of the Administrative Office of the United States Courts 1990, and the year before it defeated a request for over $.5 million. Annual Report of the Director of the Administrative Office of the United States Courts 1989.

[77] See Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUDIES 57, 63 n.33 (1982) (hereinafter, *Suit, Settlement, and Trial*).

If the Equal Access to Justice Act applies, however, the potential for settlement diminishes. In the same hypothetical, the private plaintiff now believes it has not only an expected judgment of $4,000, but perhaps a 60% chance (given the substantial justification standard) of recovering its $4,000 in expenses, for a total expectation of $6,400. The government in turn might consider that it has a 20% chance of paying fees, and thus its expected loss now approaches $6,800.[80] The bargaining gap has thus narrowed, although settlement is still possible. If the government believes, however, that it has no chance of paying the private attorney's fees because its position was substantially justified, then the parties will not conceivably settle the litigation.[81]

To be sure, if the parties have the same estimate of the likelihood of paying attorney's fees, then the bargaining span should not change, even if the total amount of money at stake has increased. Yet in many if not most cases, the government's estimate of its liability for fees will be less than that of plaintiff--the government generally has a higher expectation of success on the merits of both the underlying action and the fee issue itself.[82] When the government's estimate of fee exposure (largely because of the substantial justification standard) is less than that of plaintiff, there is consequently diminished range within which to reach a settlement under a fee shifting scheme.[83] This result makes a good deal of intuitive sense because when parties have more to disagree over, the prospect of agreement dims. Of course, other factors are involved in the decision whether to settle, but in the generality of cases, the prospect of fee shifting under the EAJA should make settlement more difficult to obtain.

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[78] *Id.* at 57.

[79] This relationship can be expressed algebraically to suggest that the private plaintiff will settle if $px - a \leq qy + b$, where p = plaintiff's expectation of prevailing; q = defendant's expectation that plaintiff will prevail; a = plaintiff's expected legal fees; b = defendant's expected legal fees; x = plaintiff's estimate of judgment; and y = defendant's estimate of adverse judgment. For similar analysis, see Suit, Settlement, and Trial, supra note 77.

[80] The figure might be somewhat higher because of the possibility that the government in addition would ultimately be required to pay fees for the fee litigation.

[81] Similarly, if government litigators do not internalize the cost of government litigation in deciding whether to settle, then no settlement under these facts is likely.

If anything, the EAJA probably creates a perverse incentive to litigate. Anecdotal evidence suggests that some government attorneys view an award of attorney's fees as stigmatizing because of the prerequisite determination under Section 2412(d) that the government's actions were not substantially justified. Few attorneys believe that the policy or enforcement choice they are defending was unreasonable, and thus few are willing to concede that a prevailing party is entitled to fees under the current standard. Settlement is thus less likely because of the understandable reluctance to label the government's conduct, and by extension one's own, as unreasonable.

Moreover, government litigators may be loath to settle for fear of supporting future litigation against themselves. There is little love lost between some government litigators and their opponents, particularly repeat players such as public interest attorneys, and perhaps an understandable reluctance to reward one's opponent.[84] The substantial justification standard thus opens the door for government litigators to base their determination of whether to settle cases on factors extrinsic to cost-benefit analysis such as the identity of the claimant's counsel. Should the government be required to pay a series of hefty awards, its willingness to play favorites might wane--but the appearance of impropriety might persist because the decision to settle a case is based on subjective factors.

Many instances of government litigation do not involve money per se, with litigation over eligibility for benefits and over contract performance constituting the primary exceptions.[85] Settlement of nonfinancial issues is typically far more difficult to obtain. And even those suits involving money may readily implicate principles extending far beyond the case at hand. That the EAJA in theory makes settlement of all claims marginally more difficult, therefore, probably has less tangible impact than might otherwise be expected. Nonetheless, passage of the EAJA, particularly in light of the likely disagreement over applicability of the substantial justification standard, has made settlement of the underlying suits between private litigants and the government--at least as a theoretical matter--slightly more difficult to achieve.[86]

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[82] Should the government overestimate the amount of private attorney's fees required for litigation, then the prospect for settlement is accordingly enhanced.

[83] Predicting the Effect, supra note 21, at 157; cf. Explaining Constitutional Tort Litigation, supra note 25, at 755 (hypothesizing that the government is generally less risk averse than its opponents).

[84] Government attorneys may also wish to avoid paying fees under the EAJA given that the EAJA rates--even with the cap--seem significantly in excess of what most government attorneys earn.

B. Litigation Costs

In addition to making settlement less likely, the EAJA--in no small part due to the substantial justification standard--has significant impact in increasing overall litigation costs. Fee disputes are notorious for their complexity. The Supreme Court has decried the tendency for fee litigation to dwarf the underlying dispute between private litigants and the government,[87] resulting in--as Justice Brennan noted--socially unproductive litigation, "which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion . . . in its wake."[88] The EAJA thus adds substantial costs to government litigation--even aside from the possible impact on settlement of the underlying dispute--by increasing government attorney time, private attorney time that must be compensated by the government,[89] and the time of adjudicators in both the judiciary and agencies that also must ultimately be paid for by the taxpayer.

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[85] Tort claims involve money, but the Equal Access to Justice Act excludes fee shifting in tort cases. The Federal Tort Claims Act permits private counsel to recover fees out of the award itself. See 28 U.S.C. §2678.

[86] Elimination of the substantial justification standard in some contexts might hinder settlement. Government attorneys, for instance, might be reluctant to settle cases or might decline to appeal adverse judgments if they recognized that a fee award would automatically follow. But just as likely, the prospect of fees might prompt government attorneys in other cases to settle or decline appeal because of the very fear of expanding the government's fee liability. Indeed, as discussed at text accompanying notes 77-83 supra, settlement overall should be facilitated in the absence of the substantial justification standard because one key variable has been removed from settlement negotiations.

[87] Hensley v. Eckerhart, 461 U.S. 424, 437 (1982).

[88] *Id.* at 455 (Brennan, J., dissenting).

[89] In addition, private attorney time that is not compensated by the government can well be considered socially unproductive.

Consider a relatively run-of-the mill EAJA case arising out of a civil penalty action brought by the Department of Agriculture[90] under the Plant Quarantine Act.[91] The private party successfully challenged the penalty, arguing that the pertinent regulations governing inspection of luggage and personal effects could not conceivably cover his conduct. He subsequently filed a fee application under the EAJA for approximately $6,500. Agency attorneys contested the application, arguing both that the hours were excessive and that the agency had been substantially justified in bringing the civil penalty action. At the end of hearings, the hearing officer determined that the agency had not been substantially justified, but reduced the award of fees by roughly 25%, for an award of slightly under $5,000. So far, so good. The question from the agency's perspective should be whether the $1,500 saved was cost effective given the need for the government to pay fees on fees, the need for the government to compensate its own attorneys and staff in contesting the EAJA application, and the need for the government to absorb the costs incurred by the agency hearing officer and support staff. The government unquestionably prevails in some EAJA litigation, and that litigation presumably deters inflated claims in future EAJA cases. Yet it is undeniable that defending against EAJA requests requires significant resources that could perhaps be best utilized elsewhere. No accurate gauge of the overall amount can be made because government attorneys rarely record their hours expended in litigation.

In the particular Department of Agriculture case, however, agency officials recorded the amount of time expended on the case. Combining hours recorded by government attorneys in fighting the EAJA application (50 hours + 18 hours' support staff) and the hours recorded by the hearing officer (40 hours + 16 hours for support staff) and then by the agency head on review (20 hours + 8 hours for support staff) suggests that the government as a whole expended more in fighting the fee application than was originally sought in the case. Indeed, in this instance, there was no report of whether the agency in addition paid the private attorney's fees on fees, which would have increased the government's expenditures even more. Thus, taxpayers expended roughly $9,000[92] in saving $1,500 in EAJA fees, when the most that could have been saved was $6,500. Perhaps there were nonfinancial considerations in litigating the EAJA case, but it appears almost irrelevant that the government successfully reduced the fees paid, because it was doomed to lose financially from the outset.

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[90] In re Wiley Prentice, P.Q. No. 61 (Oct. 27, 1988).

[91] 7 U.S.C. §151, et seq.

[92] As a rough measure, I used a $75 per hour figure for the salaries and fringe benefits of government litigators and hearing officers, and $20 per hour figure for support staff, even though those figures are likely somewhat high.

The Department of Agriculture case could be viewed as atypical,[93] and it could be explained as nothing more than short-sighted litigation strategy. But it suggests a more important point, namely that there are significant hidden costs in EAJA litigation, costs in terms of government attorney time[94] and that of adjudicators in agencies as well as on the bench.

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[93] There are of course other instances. The United States Army Corps of Engineers' unsuccessful effort to combat fees in Golden Gate Audubon Society v. United States Army Corps of Engineers, 732 F. Supp. 1014 (N.D. Cal. 1989), provides another illustration. The prevailing plaintiffs originally requested $43,420 in fees after the court determined that the government had not been substantially justified. Government attorneys nonetheless challenged the fee request on a number of grounds: the reasonableness of hours expended in the summary judgment motion, the reasonableness of hours expended prior to filing the complaint, nonproductive and duplicative work, etc. As the district court remarked,

> Ironically, that portion of plaintiffs' current claim *not* challenged by federal defendants amounts to $34,012, nearly 80% of the original claim. Thus, in retrospect, it appears that by intensively litigating the fee petition, federal defendants caused plaintiffs to incur approximately $31,000 in additional expenses (to say nothing of the significant portions of defendants' and the court's time that were also consumed) in order to potentially save approximately $9,408.

Id. at 1022 n.12 (emphasis in original). Government attorneys estimated that they expended sixty hours litigating the fee issues, though that figure appears extremely low given the briefs and hearings involved. See also A. Koh, *Lawyer Awarded $10,000 Fee After Government Refused $600*, N.Y.L.J., Nov. 12, 1987, at 1. col.4.

Although the study suggests that government litigators at times make short-sighted litigation decisions in combatting EAJA applications, other efforts have been justified from a cost-benefit perspective. See text accompanying note 119 infra.

[94] Consider as well the efforts of the government attorneys in the Civil Division of the Justice Department in contesting EAJA applications. The Civil Division, a litigating force of some 500 attorneys, is responsible for all tort, contract, and agency litigation involving the government, with the exception primarily of antitrust, tax, and some specialized agency cases. Most EAJA litigation is conducted outside the Department of Justice by agency staff in conjunction with Assistant United States Attorneys. For instance, 15 cases decided in the target year were handled by DOJ attorneys out of the more than 400 reported to the Administrative Office of United States Courts, and only 10 were supervised or litigated by the Civil Division. Because line attorneys in the DOJ are now required to record time spent on various cases (even though their reporting duties are in no way policed and in some instances honored in the breach), some approximation of the government attorney resources expended in EAJA litigation is possible. During the target year over 4,500 hours were recorded on EAJA matters in the Civil Division (not limited to the cases resolved during that year), exclusive of most time expended by supervisors within the Division's various branches. Those hours, which according to DOJ officials considerably underestimate hours actually expended, represent more than the full workload of two attorneys. Nor do those hours include the efforts of attorneys from the DOJ's client agencies, which assist DOJ attorneys in handling EAJA (as well as other) cases arising out of their agencies.

The substantial justification standard in effect requires parties to relitigate their underlying dispute. Eligible parties must demonstrate to the judge or hearing officer that the government was not only wrong in the underlying litigation, but that it was inexcusably wrong. To make that showing, private parties must analyze all the legal questions and factual disputes anew in an effort to persuade the decisionmaker of the government's lack of substantial justification. At times, fresh research by both sides is required to determine whether, in light of prior precedents, the government was justified in asserting the position that it did. At other times, research can reveal whether the government should have known not to rely on a discredited witness or statistical study. Thus, not only is there an element of repetition in arguing that the government was not only wrong but unjustifiably so, but the very arguments can be taxing to litigants and courts alike.

In assessing the cost of the EAJA, therefore, it is insufficient to factor in only the costs of payments to private attorneys. In the absence of the EAJA, fewer government attorneys would be required, or government attorneys could be shifted to work on issues of possibly greater social importance. Moreover, the burden on the federal judiciary would be lightened somewhat, and the workload of agency hearing officers would correspondingly diminish. From the taxpayer's perspective, the uncertain benefits of the EAJA in general must be assessed against the backdrop of increased litigation costs on several fronts, and the utility of the substantial justification standard, which saves the government money in some cases, must be balanced against the increased costs of litigation attributable to that standard.

C. Empirical Data

To gauge the current costs of the EAJA, I conducted a study of the costs associated with disposition of all EAJA applications resolved from June 30, 1989 to June 30, 1990. I selected that time period because it was the most recent available following the Supreme Court's decision in *Pierce v. Underwood*,[95] which held that the substantial justification standard was essentially one of reasonableness, and that appellate courts should defer to the trial courts' findings on that issue.[96] Within that period, the Court issued its decision in *Commissioner, INS v. Jean*,[97] holding that the EAJA requires the government to pay the private party's fees for litigating fee issues whenever the government cannot bear its burden of demonstrating substantial justification for the underlying litigation. The decision in *Jean* should have paved the way for a modest increase in the amount of attorney's fees awarded, and accordingly, I would expect the fees on fees paid by the government to increase, barring an increased rate of settlement, in future years.[98]

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[95] 487 U.S. 552 (1988).

[96] Although I did not study the number of appellate decisions preceding and following *Underwood*, evidence compiled by the Administrative Office confirms that there have been somewhat fewer appeals in recent years. In 1988, for instance, the Administrative Office reported that 67 EAJA decisions were issued by appellate courts, and 54 decisions the next year. Annual Report of the Director of the Administrative Office of the United States Courts 1988-

By statute, the Administrative Office of United States Courts ("AO") collects all EAJA decisions resolved by Article III tribunals. The reporting scheme, however, is predicated on the willingness of court clerks to transmit the pertinent information (on provided forms) to the Administrative Office. The AO reported 412 decisions for that time period, and over 90% of the reported cases involved social security claims. Some caution is in order, however. No decisions, for instance, were received from California district courts, the Southern District of New York, and Texas. In fact, the Administrative Office report itself reveals that applications from four districts--New Jersey, Northern Iowa, Western New York, and Western Louisiana--accounted for 40% of all dispositions. The number of decisions, and amount of money reported, therefore, underestimate the correct figures.

To supplement the cases reported, I checked all decisions reported during that time period in attorney fee reporters and on the computer networks. A number of decisions were found in that manner, including several in jurisdictions that did not report any cases to the Administrative Office. But those services do not report all EAJA applications arising out of social security claims. To get that number, I requested and ultimately received data from the Social Security Administration (SSA) reporting all EAJA applications resolved during the target year that arose out of individual benefit cases. SSA's figures, which include settled cases, dwarf the numbers reported to the Administrative Office.

Another pool of cases consisted of agency EAJA determinations, which by law are to be reported to the Administrative Conference of the United States. I collected data on cases resolved during the relevant time period, recognizing

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1989. In contrast, information supplied to the Administrative Office reveals that only 16 appellate decisions were issued during the target year. Annual Report of the Director of the Administrative Office of the United States Courts 1990.

[97] 496 U.S. 154 (1990).

[98] I was surprised to learn in the study that some parties who successfully obtained fees under the EAJA did not file for fees on fees, either because of oversight or because the amount at stake was not worth the "hassle" of filing for the fees.

that a number of agency determinations were probably not reported.[99] The two Administrative Conference reports encompassing the target year (the Administrative Conference reports cases decided from October 1 through September 30 of the next year) establish at least a fair approximation of the number of decisions, and amount of money paid, during the target year.

The primary object of the study was to determine the financial significance of litigation over the substantial justification standard in cases resolved during the target year, and secondarily, to approximate the litigation costs involved in EAJA disputes. I hoped to calculate the percentage of cases in which the fee application was denied due to a finding that the government's position was substantially justified, the potential EAJA fees saved by the government in such cases, the amount of fees on fees paid (fees paid to prevailing parties for work on the fee case), and finally, a rough approximation of the amount of government attorney time defending against EAJA applications.[100] I contacted attorneys involved in every agency case, and in every other case not involving social security litigation. Moreover, I took a statistical sampling, based on a random number table,[101] of all individual benefits cases reported to the Administrative Office.[102] Over one-half of the private attorneys responded, generating usable (if approximate) data for those cases. See Table 1. (Tables are in the Appendix.) The data were sketchiest with respect to the amount of fees awarded for the fee litigation itself. Many private attorneys either had not kept accurate records, or were unwilling to sort through their records to ascertain a separate amount. Moreover, it was not possible to piece together how many of those hours were devoted to litigating the substantial justification issue, although counsel attributed the bulk of the research to litigation over that issue.[103]

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[99] In each category, there may be a problem of unreported settled cases. Anecdotal evidence suggests that the proportion of settled unreported cases was quite low. And all the settled cases were reported by the SSA because of its centralized payment office.

[100] Calculating judicial cost is extremely difficult. See J. Kakalik & A. Robyn, Costs of the Civil Justice System, Court Expenditures for Processing Tort Cases (1982).

[101] Use of a random number table should lead to a representative sampling, even though some jurisdictions did not report EAJA cases to the Administrative Office. Social security cases in my review did not vary significantly from region to region, except for the procedures by which they were resolved.

[102] To some extent, that focus was dictated by the fact that it took so long to obtain the data from the Social Security Administration, and that the SSA data did not include names of either the private or government attorney involved. In any event, the size of both groups of social security claims was similar, as was the percentage of cases in which fees were awarded (85%). The failure to report to the Administrative Office appears largely due to the unwillingness of court clerks to cooperate with that office, and that factor should not skew the representativeness of the cases that were in fact reported. It is also possible that some court clerks did not report data on settled cases even though those settlements must generally be approved by the courts before SSA will pay the award.

In comparison, the government response overall was quite limited. Too few government attorneys keep track of their time to make study of government time meaningful. Nonetheless, some government attorneys record their time on particular cases, either because of an agency requirement, as at the Department of Justice, or because of personal interest. With the data received, government attorney time could be assessed in at least a fraction of the cases. A model was generated from the information available in nonsocial security court cases, social security individual benefits cases, and agency cases (see Tables 2-5 in Appendix), even though the statistical representativeness of the sample is unclear.[104] As with information obtained from private attorneys, it was impossible to attribute what percentage of government attorney time was devoted to demonstrating the substantial justification of the government's position. At least in all cases not involving individual benefits claims, however, the issue of substantial justification was litigated in every case and, judging from anecdotes, generally received the most focus from the government (as well as private) litigators.

1. Court Cases Not Involving Individual Benefits

For the target year, the Administrative Office reported 412 EAJA applications resolved, of which 27, or 7%, did not arise out of social security individual benefits litigation. Of those 27 cases, fees were granted in 21 cases,[105] and the government's defense of substantial justification was dispositive in four of the five denials[106] for which I received data.[107] The

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[103] Disputes over the reasonableness of hours in contrast generally require less research.

[104] There was obviously self-selection, but how that may have skewed the data is unknown.

[105] Those fee awards were not necessarily paid, however, because the EAJA decisions are subject to further review.

[106] The Administrative Office reported the sixth denial as an application against the Department of Energy seeking $267,476 in fees.

[107] Roughly 20% of the cases, in other words, were denied because the government's position was substantially justified. That figure was similar in the preceding year, but significantly larger in the year before.

Fees can be denied for other reasons besides the substantial justification of the government's position. The Administrative Office reported that of the 41 applications denied that year (including social security cases), only 26 were denied because of the government's substantial justification. Annual Report of the Director of the Administrative Office of the United States Courts 1990. Others were denied because of the lack of timely filing, because the applicant was not a prevailing party, etc. During the preceding year, only one-half of all denials rested on a median award in this group of 21 cases was approximately $40,000,[108] and the mean award was slightly more, at $48,000. The difference between the median award and mean award was probably less this year than in most, because there was only one award in excess of $200,000.[109]

Within this group of 27 cases, I received relatively complete data only on four cases (Table 2). The government lost in all four cases, and the amount awarded was $108,931. In litigating the cases, the private parties collected $20,717 in fees on fees, and government attorneys recorded an estimated 288 hours of work, which would amount to roughly the same amount of money if calculated at $75 an hour.[110] The government attorney time was significantly understated, given that the efforts of client agencies were not included in the hours recorded. Obviously, litigating the substantial justification issue in these four cases was to no avail, and cost the taxpayer considerable money, without even considering the judicial resources expended. In this group of cases, litigation expense on the fee application approximated 40% of the amount of fees originally claimed by the private prevailing party, not counting the unrecorded time of attorneys from the client agency.[111] Although the government did save considerable money in litigating the substantial justification issue in several large cases for which I did not receive government attorney time, the amount saved represents only a modest percentage of the amount awarded overall. Approximately 15% of the $1.7 million sought in

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finding of substantial justification. Annual Report of the Director of the Administrative Office of the United States Courts 1989.

[108] The figures reported to the Administrative Office and Administrative Conference include expenses such as photocopying costs, expert witness fees, etc. Those expenses were so minimal in relation to the amount of fees paid that I have ignored them for the purposes of this study. For instance, the AO reported that, in the target year, $40,229 was awarded in expenses in comparison to the $2,179,350 granted overall.

[109] Greater awards would skew calculation of the mean. In comparison, the Justice Department recently settled two EAJA applications for more than $1 million each. Both cases arose out of successful challenges to INS policy with respect to refugees. Orantes-Hernandez v. Thornburgh, No. 82-1107 (C.D. Cal. July 2, 1991) ($2.5 million) (refugees from El Salvador); Jean v. McNary, No. 81-1260 (S.D. Fla. Feb. 25, 1991) ($1.7 million) (refugees from Haiti).

[110] Government attorneys make less than $75 an hour, but the $75 estimate includes overhead and benefits. Similarly, the billing rate of attorneys in private firms is greatly in excess of the compensation paid to those same individuals.

[111] In the four cases, the total amount claimed was $117,376. The parties evidently included in that amount sums ultimately requested (and subsequently granted) for work on the fee applications. Thus, the percentage of litigation expense in the sample actually exceeds 40% of the amount originally claimed. That percentage, though high, is not startling given that preliminary research suggests that the legal fees of both sides taken together in small cases may often exceed recovery by a plaintiff. Trubeck, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 U.C.L.A. L. REV. 72, 121 (1983).

those 27 cases was saved by virtue of the substantial justification defense,[112] though some of those fees might have been disallowed for other reasons. Given the government's relatively low success rate, eliminating the substantial justification standard would not have increased the government's exposure appreciably in this group of cases. As mentioned previously, the substantial justification standard might nonetheless serve as a critical filter in preventing other cases from being filed.

Furthermore, the amount of fees requested in these four cases was $117,376, of which $108,931 was awarded. Even with respect to the reasonableness of the fees requested, therefore, the government arguably did not act in a cost-effective way--putting to the side the possible deterrent effect of vigorously contesting the amount of fees. The government presumably expended more in litigation than the $9,000 saved. The Administrative Office figures bear this relationship out, though not as dramatically. In the 21 cases in which $1 million was awarded, only $1,187,624 was claimed. Thus, the modest reduction in attorney's fees was to a large extent offset by the need to pay government attorneys' salaries and the need to pay fees on fees. Government efforts were plainly cost effective in contesting only the several large fee applications presented--litigating the vast majority of remaining cases, at least in retrospect, appears wasteful.

2. Individual Benefits Cases

There are two sets of data with respect to individual benefits cases administered by the Social Security Administration. First, the Administrative Office reported applications for EAJA fees in 385 social security cases, of which 350 were granted, or 91% of the total. For those 350 cases, the amount claimed was $1,300,005, and the amount awarded was $1,171,075. The amount saved in the 35 cases was $160,947, some of which can be attributed to the court's determination that the government's position was substantially justified. The percentage of applications denied by virtue of the substantial justification defense was less than 10%.[113] The mean award was $3,346, which was probably close to the median given that there are few, if any, huge awards in individual benefits cases.

The more complete data submitted by the Social Security Agency were quite similar. There were 2,007 applications for fees resolved, with 1,700 granted, or 85% of the total.[114] Of the applications granted, the mean request was $3,584, and the mean award was $3,244. Of the applications denied, the average request was $2,867. The total amount potentially saved by litigating the substantial justification issue was obviously quite modest, putting to the side again the question of deterring additional claims.

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[112] If, in the one case for which I did not receive data, the court denied fees on the ground that the government was substantially justified, then the percentage saved by virtue of litigating the substantial justification issue would double.

[113] HHS also successfully defended against fee applications because of their lack of timeliness, because the private party had not prevailed, etc.

I received relatively complete data on 14 HHS EAJA applications arising out of individual benefit claims (Table 3). The private party prevailed in 13 cases, which departs only slightly from the overall average in such cases.[115] In those 13 cases, courts awarded (through approval of settlements or after litigation) $59,335, for a mean award of $4,564, slightly above the figure for all HHS cases. Of that $59,335 total, $4,595 was expended on fees on fees, and HHS regional attorneys recorded 90 hours of attorney time, which would amount to $6,750 if calculated at $75 per hour. Those amounts taken together constitute approximately 20% of the amount of fees claimed, a lesser percentage than in nonsocial security cases. In all of the cases, however, the regional HHS attorney works in tandem with an Assistant United States Attorney. The hours for the AUSA's were not recorded, but even if the AUSA's devoted less time to EAJA applications than did the regional attorneys, the number of hours expended by government attorneys should be substantially higher than the numbers I obtained. In addition, it is impossible to reconstruct how much time was devoted to the substantial justification issue, but in the only case in which the government prevailed, the HHS attorney expended an estimated 15 hours in defeating a $7,650 claim, which was an abnormally large EAJA claim. Thus, in this sample of individual benefits cases, the utility of litigating the substantial justification issue is open to serious doubt, and in fact, the government evidently conceded the issue in some cases by agreeing to settlement. Extrapolating to the entire pool of HHS cases, the government saves very little from litigating the substantial justification issue, and the administrative burden is considerable. The greater rate of settlement in HHS cases is thus quite understandable. Fees on fees as well as the need to compensate government attorneys nearly cancel out the amount of money saved due to the periodic finding that the government's position was substantially justified.

In addition, although the data were sketchy, government attorneys successfully bargained or litigated the applications down from the $67,327 originally requested, to the $59,335 awarded. Overall, then, in the 14 cases government attorneys saved slightly more by litigating than they would had they paid the full fee requests, not considering 1) any deterrent effect on subsequent applications; 2) hours generated by AUSA's, and 3) hours expended in judicial resources. From the perspective of the taxpayer, the wisdom of such government litigation is questionable at best, unless the deterrent effect on future fee applications is significant.

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[114] According to the Administrative Office, the 85% figure has stayed relatively constant for the last several years. Annual Report of the Director of the Administrative Office of the United States Courts 1988-1990.

[115] The HHS cases were from two regions, but there is no reason to suspect that HHS cases in those two regions differ significantly from cases in the rest of the country.

3. Agency Cases

The Administrative Conference issued two reports to cover the time period targeted in the study. In its first report, it reported that 108 fee applications from agency adjudications were resolved, with 56 grants, and 52 denials. The amount awarded was $577,077,[116] the mean award being $10,305. In 33 of the 52 applications denied, the agency determined that the government had been substantially justified in the underlying litigation.

In the next year, only 70 applications were decided, 34 applications granted, and 36 denied. The total amount awarded, however, $961,672,[117] was almost double the preceding year. The difference largely stemmed from the presence of one $475,724 award. Because of that award, the mean award jumped to $28,284, while the median stayed constant, at $10,868. Nineteen applications were denied because the agency determined that the government had been substantially justified in the underlying litigation.[118]

Within this group of cases, I received relatively complete data on eight cases, which constitutes roughly 10% of the cases in the target year. See Tables 4-5. The government defeated the application in two cases, in one because its position was substantially justified, and in the other on jurisdictional grounds. The total amount awarded from the eight applications was $651,678, which included the single largest award in that year, the $475,724 award in resolving consolidated claims before the Armed Services Board of Contract Appeals. The amount saved in the one case in which the government was determined to be substantially justified was $9,133, assuming that the full amount claimed was properly payable. In pursuing the six successful applications, private attorneys estimated that they incurred $51,358 in fees that were compensable as fees on fees (and factored into the overall award). For their part, government attorneys estimated that they expended 318.25 hours in fighting those applications, which at $75 an hour (for the sake of comparison) amounts to $23,869 of taxpayer money. Litigation fees thus constituted only 6% of the total amount claimed, and twice that percentage for the amount awarded.

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[116] That figure apparently does not include awards for 22 cases in which the amount was not reported or in which the agency, after determining that the private party was entitled to fees, directed the parties to engage in settlement negotiations. Report of the Chairman of the Administrative Conference of the United States on Agency Activities Under the Equal Access to Justice Act (October 1, 1988--September 30, 1989).

[117] That figure apparently does not include awards for 11 cases in which the amount was not reported or in which the agency, after determining that the private party was entitled to fees, directed the parties to engage in settlement negotiations. *Id.*

[118] Report of the Chairman of the Administrative Conference of the United States on Agency Activities Under the Equal Access to Justice Act (October 1, 1989--September 30, 1990).

It is impossible to determine how much of the private and government attorney resources was devoted to the substantial justification issue in this group of cases. Plainly, however, litigating over the substantial justification issue was not justifiable on a cost-benefit basis, and briefing the substantial justification issue generally takes up considerable time because of the research involved. At most only $9,000 was saved in comparison to the ultimate awards totalling $651,000. This figure is misleading, however, given that the government prevailed on the substantial justification issue in 29% of the cases during the 2-year period, which is almost 50% more than its success rate in nonsocial security court cases during the target year.[119]

Government attorney efforts in this group of cases were rewarded in reducing the amounts originally claimed. According to the data submitted by the litigants, the amount originally sought in this group of eight cases was $1,308,713. The government thus saved the taxpayers half of the amount claimed at a cost of approximately only $51,000 in fees on fees and perhaps half that amount again in government attorney time. Putting to the side the question of adjudicatory resources, litigating over the size of the claim, at least in this group of cases, was clearly cost effective. That effectiveness, however, was largely due to the agency's success in reducing the large contract award from $968,490 to $475,724. Excluding consideration of that case, private claimants in the past year originally claimed $609,570 in the fee cases in which $485,947 was ultimately awarded (Table 5), a percentage saving that is still somewhat higher than in the court cases.

In short, the data collected confirm that the government successfully invokes the substantial justification defense in a modest proportion of all cases, in less than 15% of the social security cases, in 20% of nonsocial security court cases, and in 30% of agency cases. The data collected, however, were too sketchy to demonstrate anything else empirically. The failure of government attorneys to record the time they spend on various cases itself suggests the difficulty of forcing the government at present to internalize the cost of litigation. Nonetheless, the evidence collected in the sample of cases corroborates the thesis that, had the substantial justification standard been rescinded, the overall government expense in administering the EAJA would not have been significantly greater, putting to the side the question of how many new applications might be filed. The money saved through litigation was modestly in excess of the amount of fees on fees paid and compensation due government counsel, disregarding judicial costs.

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[119] At least one commentator has speculated that the greater incidence of denials due to substantial justification in agency cases reflects the agency adjudicator's lack of independence. Stewart, *The Equal Access to Justice Act: A Failure in Agency Proceedings?* NAT'L L. J. 20 (May 21, 1984).

III. Potential Revisions

The data generated by the empirical study, in conjunction with analysis of the incentive structure in the Act, suggest that two quite different approaches are possible to address the most prominent deficiencies in the Act--the inordinate transaction costs and the less than successful effort to deter government wrongdoing. The most dramatic option would be repeal.[120] Taxpayer dollars could be more effectively allocated elsewhere if monitoring governmental wrongdoing is the predominant goal of the Act.[121] Alternatively, if the Act is to be retained, an automatic one-way fee shifting mechanism might marginally increase deterrence of government errors and encourage more suits to be brought without much extra expense. Transaction costs would be minimized and settlement plausibly facilitated under such a scheme, and government officials--particularly those in charge of enforcing regulatory requirements and making eligibility determinations for benefits--might be forced to think a little longer before acting. Converting to automatic fee shifting might also make sense as a compensation strategy, even though it is debatable whether eliminating the substantial justification standard would comport with corrective justice principles. Given the competing pull of the underlying policy goals--equalizing the parties' bargaining positions, minimizing government errors, and furthering corrective justice--the choice of whether to rescind the Act, convert to automatic fee shifting, or do nothing may appear close. But, irrespective of one's views of changing the Act in general, automatic fee shifting is warranted in the social security disability context.

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[120] Whether one would favor such an option in the absence of assurances that the money saved--arguably $7 to 8 million a year ($5 to 6 million a year in payouts and several million in transaction costs)--would be channeled to parties injured by the government raises a separate question.

[121] Some have suggested that additional training of government employees or additional congressional inquiries following on the heels of government wrongdoing might help deter subsequent wrongdoing. See P. Schuck, Suing the Government (1983).

A. Rescinding the Act

Despite its all too evident costs, the EAJA has not wrought any benefits that can be empirically verified. For reasons canvassed earlier, the prospect of attorney's fees only rarely enables more vigorous representation of private parties in litigation against the United States. Most private parties satisfying the eligibility requirements in the Act have the financial resources or incentive to contest governmental action irrespective of the cost of the litigation. Those parties who can barely afford counsel are not likely to hire counsel merely because of the EAJA since they need to be confident not only of ultimate success, but also of the government's inability to demonstrate that its position was substantially justified. The EAJA might afford such claimants or other parties the luxury of obtaining better counsel, or it might afford them greater financial security, but only seldom does it enable litigation to proceed where it would not in the absence of the Act.

At the same time, there is little reason to believe that fee shifting under the Act has successfully deterred government wrongdoing. The substantial justification standard itself makes the prospect of added deterrence unlikely, because government officials independent of the Act have considerable incentives to formulate only reasonable government policy and pursue only reasonable enforcement initiatives, both because of internal political checks and the omnipresent likelihood of external oversight through judicial review. Moreover, the size of any attorney fee award is likely to be too small to be of concern to either policymakers or enforcement officials.

Yet, despite the Act's likely lack of effect, millions of dollars each year change hands, a significant percentage of which is attributable to the transaction costs or litigation expense arising out of disputes over EAJA applications.[122] To be sure, some attorney fee awards make challenges to future government conduct more likely, and compensation under the Act is normatively appealing to many because of the government's possible "fault" in forcing the private party to litigate. Much of the overall cost in administering the EAJA, however, is attributable to payment of government attorneys and government decisionmakers, which in no way serves the underlying purposes of the Act. Whether from a perspective of deterrence or corrective justice, that money can more effectively be spent in other ways.[123]

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[122] The study suggested that 20-40% of the EAJA's cost in court cases is attributable to such transaction costs, exclusive of the resources consumed in judicial decisionmaking.

[123] I do not want to discount the possibility that the Act should be retained as it is, because of its marginal role in equalizing the parties' litigating strength, and its concomitant value as a compensation measure, tempered by distributive concerns. Except for social security cases, as I discuss at text accompanying notes 145-67 infra, such a result seems plausible, even though the

B. Automatic Fee Shifting

Converting to an automatic fee shifting mechanism would plausibly provide more incentive for private parties to contest government overreaching in at least some settings, and possibly augment deterrence of governmental errors. Although the change would lead to greater government exposure to fee awards, the larger number of awards would be balanced to some extent by savings in litigation costs. And while the move from a fault standard as a basis for compensation might be unpalatable to some, automatic fee shifting arguably would have beneficial distributive effects in ensuring that private parties of modest means are fully compensated for injuries due to governmental errors.[124]

1. Scope of any Change

For reasons discussed previously, the case for added deterrence is more plausible in fact-specific contexts such as benefit determinations or enforcement than for challenges to general policy.[125] Government officials implementing preexisting guidelines are more likely than their counterparts to internalize the potential cost from attorney's fees. They are more concerned with case-specific facts, and the costs associated with enforcing broad policies in particular contexts. Moreover, case-specific decisions, as opposed to policy decisions, generally involve less money, so that the prospect of attorney fee awards is likely to be more significant in comparison. It would be tempting, therefore, to limit the EAJA to the situation-specific contexts.

Act appears quite inefficient. If the substantial justification standard is retained, transaction costs should be minimized in the ways I suggest at text accompanying notes 168-96 infra.

[124] Automatic fee shifting against large parties might also make sense, but only if such fee shifting is reciprocal, as recommended under the President's Executive Order 12778 on Civil Justice Reform §1(h) (Oct. 23, 1991).

[125] As discussed previously, the internal checks safeguarding government action operate more effectively at the policy level. Government policy decisions are generally preceded by more internal discussion, more input from affected private parties--whether through notice-and-comment rulemaking or informal lobbying--than are case-specific decisions. The generality of policy decisions ensures greater visibility and usually greater debate. In addition, Congress itself (or more accurately, interested members of Congress) is more likely to be aware of government policy as opposed to case-specific determinations, because more people are affected and greater resources are at stake. *Ex ante*, Congress can therefore more readily exercise a check on the content of policymaking than on case-specific decisions due to relative visibility of government policy, and the likelihood of congressional oversight *ex post* is also greater for policymaking than case-specific decisions, if for no other reason than because of the appearance of impropriety if Congress meddled in particular enforcement or benefit proceedings.

Consider the facts underlying the Supreme Court's fee decision in *Pierce v. Underwood*.[126] There, individuals successfully sued the Department of Housing and Urban Development for its decision not to implement an "operating subsidy" program which was ostensibly authorized by Congress. The pertinent housing statute provided for three subsidy programs. While the statute provided that the Secretary was "authorized to make" the operating subsidy payments in question, it stated that the Secretary *shall* make the other payments. In 1974, Secretary Hills determined that, in light of the insufficient funds provided by Congress, she would allocate the funds to the two subsidy programs she believed Congress had stressed. That decision had enormous practical significance to apartment owners, as well as dwellers, across the nation, and the decision was apparently reached at the highest level of the agency.[127] Even though the decision was not preceded by notice-and-comment rulemaking, interested parties had ample opportunity to lobby the Secretary before she made the decision. And because the decision had immediate ramifications, it was subject to oversight by interested committee members in Congress. Thus, while the decision may well have been incorrect, it had been substantially shaped by political forces, and the existence of such political checks minimized the likelihood of an arbitrary decision.[128]

In contrast, consider the dispute underlying the court of appeals' award of fees in *Wilkett v. ICC*.[129] There, a trucking company successfully challenged the ICC's denial of its application for an expanded license. ICC officials refused the request because they had uncovered evidence that the owner had been convicted of various nontransportation related criminal offenses, despite the fact that the owner had complied with ICC regulations fully in the past, and despite the fact that the ICC had previously considered only the company's track record of compliance in determining fitness for future service. The ICC's fact-specific determination in the case set no policy for the future,[130] probably would not have attracted Congress' attention, and did not likely invite widespread participation within the agency. Irrespective of whether the action was justified, it was not checked as fully by the political process as was the decision underlying *Underwood*.

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[126] 487 U.S. 552 (1988).

[127] See Ross v. Community Services, Inc., 395 F. Supp. 278, 285-86 (D. Md. 1975).

[128] See also Trahan v. Reagan, 824 F.2d 96 (D.C. Cir. 1987) (awarding fees for successful challenge to IRS issuance of forms, despite the fact that issuance was preceded by substantial debate amongst interested agencies); Smith v. O'Halloran, 930 F.2d 1496 (10th Cir. 1991) (awarding fees for successful challenge to Secretary's decision to promulgate "facility-oriented" enforcement system rather than patient-oriented system to ensure that hospitals operated consistent with Medicaid requirement). Cf. Griffon v. United States Dep't of Health & Human Services, 832 F.2d 51 (5th Cir. 1987) (denying fees to successful challenge to regulation, adopted after notice-and-comment rulemaking, which gave retroactive effect to procedural statute).

[129] 844 F.2d 867 (D.C. Cir. 1988).

[130] Indeed, it evidently could not be reconciled with prior ICC decisions. *Wilkett v. ICC*, 710 F.2d 861 (D.C. Cir. 1983).

The distinction between government policy and implementation decisions, however, often breaks down in practice.[131] Government policy has long been made not only through rulemaking and other less formal modes, but also through case-by-case enforcement actions or benefit determinations.[132] Eligibility standards for benefits or licenses, for instance, may become clearer as elaborated in each successive agency determination as in *Wilkett*.[133] Availability of EAJA awards in case-specific implementation actions might nonetheless serve a salutary purpose. Commentators have long urged agencies to formulate policy through rulemaking rather than adjudication.[134] At least in theory, policy emerging through rulemaking (or even less formal means, as in *Underwood*) benefits from wider participation from interested members of the public as well as within the agency itself. The ramifications of proposed policy may be more easily assessed, and the decisionmakers are not as likely biased by any disposition in favor or against a private party as they may be in litigation. The EAJA thus could spur agencies--at the margins--towards fashioning policy outside of litigation. Agencies could make policy through implementation actions,[135] but at the risk of opening themselves to EAJA awards.

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[131] Many agency policy determinations, for instance, are unpublished as in *Underwood*, and thus have not been tested by the formal requirements of notice-and-comment rulemaking. The more informal the policy, the closer to case-specific judgment it becomes. Even then, however, greater political checks likely constrain the agency in comparison to case-specific decisions. The generality of the policy ensures against ad hoc deliberations, and the greater impact of a general policy suggests that significant *ex post* checks exist to correct wrongdoing.

[132] Conversely, some policy determinations affect only a relatively few individuals. Consider, for instance, legislative enactments exempting individuals from rules of broad application, see, e.g., §309 of the Energy and Water Developments Appropriation Act, Pub. L. No. 100-202, 101 Stat. 1329 (1987) (prohibiting Department of Energy from enforcing judgment it had obtained against oil magnate), or targeting one particular enterprise, see Pub. L. No. 100-202, 101 Stat. 1329 (1987) (forcing Rupert Murdoch to divest ownership of either television station or newspaper) (see News America Publishing, Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988), striking down the law).

[133] The Supreme Court has routinely upheld an agency's choice to formulate policy either through case-specific determinations or through general policymaking. In *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), for example, the Court sanctioned the SEC's policy justification for denying a petition for reorganization. The SEC reasoned that, in certain circumstances, management could not trade its own securities during reorganization proceedings, and it intended that reasoning to apply prospectively. Similarly, in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), the Court held that the NLRB could change its prior policy of treating buyers as managerial employees through case-by-case enforcement actions. Authorizing EAJA awards only in fact-specific cases, therefore, runs the risk of affecting government policy formulation as well as implementation of that policy.

[134] See, e.g., Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1986); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

The distinction between challenges to government policy and fact-specific determinations could be pursued in several different ways. The EAJA, for instance, could be limited to challenges arising out of agency adjudications, since almost all agency adjudications involve enforcement or fact-specific determinations. But such a change would also exempt case-specific decisions heard in federal court, and it might retain fee shifting for some challenges to government policy within its sweep, since government policy is at times challenged through adjudication in the agencies.

Alternatively, the EAJA could be limited to all cases in which the government is the moving party, suing private individuals or companies in court and bringing enforcement actions before the agency. The government generally sues private entities in its enforcement role, and defends against challenges to government policy efforts. Indeed, many federal agencies are divided into enforcement and defense divisions.[136] Nonetheless, there is not a neat fit between defensive litigation and defense of policy. For instance, the government generally defends against challenges to its benefit determinations, which are case-specific, and the government may either sue or be sued on contract claims. Moreover, just as in private litigation, the configuration between plaintiff and defendant is sometimes happenstance, whether because of a particular procedural requirement forcing targets of enforcement to sue to block enforcement efforts, or because of the declaratory relief sought.

Finally, the distinction between general policy and case-specific determinations could be effectuated by exempting challenges to overall government policy from the Act.[137] The EAJA could apply only to cases in which private parties have successfully challenged governmental application of rules to a given factual situation. For instance, the EAJA could exempt successful challenges to "previously-set rules, policies, or practices of general application." The exemption could apply regardless of whether the challenge arose in the context of an adjudication, enforcement action, or rulemaking.

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[135] Private parties may challenge previously set policy either by directly challenging that policy or by challenging it instead in the midst of an adjudication over application of that policy to particular facts.

[136] See, e.g., United States Government Manual 711 (1991 ed.) (division of responsibilities in SEC); 28 CFR §0.65 (division within Environmental & Natural Resources Division of Department of Justice).

[137] For instance, courts have needed to determine whether a bargaining proposal is inconsistent with a government-wide rule or regulation under the Civil Service Reform Act, 5 U.S.C. §7117. See, e.g., U.S. Merit Systems Protection Board v. FLRA, 913 F.2d 976 (D.C. Cir. 1990); Dep't of Navy, Military Sealift Command v. FLRA, 836 F.2d 1049 (3d Cir. 1988).

Although the distinction between policymaking and implementation of policy has theoretical validity, the difficulty of distinguishing between the two may suggest to many that it is not worth crafting such an exception. Moreover, the study reveals that there are comparatively few occasions in which fees have been awarded under the EAJA for challenges to government-wide policy as in *Underwood*. Any attempt to confine the EAJA to certain categories of cases--unrelated to the underlying causes of action--is probably unrealistic.[138]

In short, if the goal of the Act is to equalize the strength of the parties and monitor the government's conduct more effectively, then there are at least plausible reasons to adopt an automatic fee shifting approach. Particularly in contexts in which agency officials apply previously set rules on a case-by-case basis, greater monitoring might prove beneficial. Although it is unlikely that awarding fees for successful challenges to rules of general import would improve monitoring of governmental conduct, exempting such policy challenges appears impractical. Thus, those desiring some additional mechanism by which to deter governmental errors as well as to encourage suit may favor an across-the-board switch to automatic fee shifting.

2. Increased Compensation

Converting to an automatic fee shifting mechanism would obviously increase compensation paid by the government to those injured by its acts. The change need not be justified in terms of compensation, because of the possible instrumental reasons favoring elimination of the substantial justification standard. But, in light of the shaky instrumentalist arguments previously discussed, a compensation argument might prove dispositive in determining whether to amend the Act. From a compensation perspective, automatic fee shifting might be defended either because the injury suffered by the private party is "wrongful" even when the government is substantially justified, or out of a desire to redistribute wealth from the government to private parties of modest size whom the government in some way has injured.

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[138] There might be several other ways to restrict the scope of any revamped EAJA. Congress, for instance, might choose particular agencies or agency proceedings that, because of questionable actions in the past, warrant coverage. Or, Congress could consider the bureaucratic incentive scheme in various agencies to determine the likelihood that fee awards might chill agency initiative. Agency actions not protected by deferential standards of review, for example, might be exempted from the Act's coverage. The difficulty of making such assessments and the obvious attractiveness of across-the-board rules suggest that the scope of the Act remain the same, even if the Act is otherwise amended.

It is difficult to discuss views of corrective justice cogently, but it bears emphasizing that, to many, a finding that the government was substantially justified is not tantamount to a finding that there was no wrongdoing. The government may be "at fault" when its underlying position was found unsupported by substantial evidence or was determined to be arbitrary. And some may believe that the government is always at fault in denying benefits to those who are eligible under statutory criteria established by Congress, or in some other way depriving parties of statutory entitlements. Even if the government cannot be considered "at fault," corrective justice principles might suggest compensation if the loss is considered "wrongful."[139] Finally, if the government can be considered a wrongdoer in a large percentage of cases in which it loses, automatic fee shifting might be justified because of the considerable costs of distinguishing those few cases in which the government is justified.

In any event, irrespective of claims of corrective justice, automatic fee shifting can be defended as a matter of distributive justice. Distributive goals arguably support compensating private parties of modest size who have been injured at government hands. Automatic fee shifting to many is thus consistent with goals of corrective and distributive justice.

3. Anticipated Costs of Automatic Fee Shifting

Converting to an automatic one-way fee shifting scheme for reasons of either increased deterrence or expanded compensation would likely have only a modest impact on overall costs, while more directly benefiting the parties challenging governmental action. Unquestionably, the government would pay more awards under an automatic fee shifting scheme, yet there would be some countervailing savings in litigation expense. Like the Supreme Court's decision automatically authorizing awards of fees for the fee litigation itself,[140] eliminating the substantial justification standard would minimize the need for protracted fee litigation and, in all likelihood, ease settlement of the underlying litigation as well as the fee dispute itself.

In terms of expense, the study suggested that, holding to the side the possibility of increasing EAJA applications, greater payments to private parties under the revised EAJA would to a considerable extent be balanced by savings in reduced government attorney time, reduced adjudicative costs, and reduced payments for private attorneys for work on attorney fee applications. A sharp increase in the number of applications filed by prevailing parties could markedly increase the EAJA's overall costs. And some increase is to be expected because the substantial justification standard undoubtedly deters some applications from being filed. But the increase is unlikely to be dramatic, since most private parties who prevail consider that there is at least some chance that a court will find the government's position to be unreasonable, as the overall 80% success rate (including agency cases) now attests, and they recognize that any time expended on fee applications can be recouped if an ultimate attorney fee award is made.

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[139] For instance, corrective justice principles might require compensation in contexts analogous to "takings" cases even when no government wrongdoing exists. Tort Law and the Demands of Corrective Justice, supra note 13. See also text accompanying notes 71-73 supra.

[140] See text accompanying notes 97-98 supra.

Even if more fee applications would be filed under an automatic fee shifting scheme, the change would not likely induce an avalanche of prospecting suits. The "reward" of $75 per hour is not attractive enough to invite abuse by most attorneys, and of course unsuccessful private parties receive no compensation at all. Even automatic fee shifting, therefore, would not ensure counsel anything close to market rates, barring an exceptional contract with their clients.[141]

Some, however, might consider automatic fee shifting inefficient in encouraging small claims that are comparatively expensive to litigate. As discussed previously, a party with a contract claim against the United States for $10,000 might not litigate if its expected fees constitute a significant percentage of expected recovery. With automatic fee shifting, a private party might have the incentive to devote more than $10,000 of fees to the case. In other words, compensation through the lodestar removes a market constraint on litigation.

The prospect of vigorous litigation over small claims, however, is not necessarily a reason to abandon automatic fee shifting. First, fee shifting equalizes the resources between the government and small private party, which helps ensure that neither side is likely to prevail because of the other side's funding constraints.[142] Second, it is quite difficult to place a price tag on much government litigation such as injunctions to determine whether pursuing the claim is cost effective, particularly given the external effect on third parties.

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[141] See also Note, *Reenacting the Equal Access to Justice Act: A Proposal for Automatic Attorney's Fee Awards*, 94 YALE L. J. 1207, 1221-28 (1985) (arguing for rescinding the substantial justification standard).

[142] The incentive to litigate small claims aggressively may prove beneficial to the system as a whole. Fee shifting enables a plaintiff to extract more from a recalcitrant defendant, and such defendants will more likely settle future small claims expeditiously. See generally Rowe, *The Supreme Court on Attorney Fee Awards, 1985 & 1986 Terms: Economics, Ethics & Ex Ante Analysis*, 1 GEO. J. LEGAL ETHICS 621, 624-25 (1988).

Even if money is at issue, there may well be broader principles at stake. One contractor's successful suit against the government over a nominal sum may benefit many contractors, and if the government prevails, it may gain an advantage in many of its dealings with contractors. Thus, while a change to automatic fee shifting will induce more claims to be filed, the increase in small claims is unlikely to result in socially wasteful litigation.

Moreover, a change to automatic fee shifting should increase the government's incentive to settle the fee dispute, and minimize litigation costs. After losing a case, government attorneys would be able to gauge the government's exposure to a fee award quite accurately, and they would likely wish to conclude settlement as soon as possible to minimize governmental cost--both in paying the private attorney for work on the fee portion of the case, and in paying for government counsel.[143] In addition, converting to an automatic fee shifting mechanism would eliminate the stigma of finding no substantial justification and thus pave the way for earlier settlement efforts, at least of the fee dispute.[144] Thus, a change to automatic fee shifting would not necessarily cause the government's current exposure to fees to rise exponentially. Increased payment of fees would, to a considerable extent, be balanced by savings in government resources.

On balance, then, the case for converting to an automatic fee shifting mechanism is plausible, but certainly not overwhelming. More private parties injured by government wrongdoing would have the incentive to contest government overreaching, and more private parties would receive full compensation for their injuries. Whether the government as a consequence would change its conduct, however, is much more difficult to predict.

C. The Special Case of Individual Benefits Litigation

Despite the shaky arguments for fee shifting against the government in general, the case for revising the EAJA in the context of social security determinations, which comprise the vast majority of all EAJA litigation, is quite strong. Automatic fee shifting would ensure representation for even small individual benefit claims for which contingency fee arrangements do not suffice. And from a distributive justice perspective, there is much to say for permitting those whose benefits were incorrectly denied to recover the full amount of back benefits without having to pay attorney's fees. Though the prospect of improving the complex social security system through fee shifting is perhaps chimerical,[145] there is concomitantly little reason to fear overdeterrence.

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[143] There would be fewer issues over which to disagree. Substantial justification is clearly the most frequent issue in dispute in EAJA fee litigation. Of the 70 fee applications resolved in agency cases during fiscal year 1990, for instance, substantial justification was at least a significant, if not the primary issue, in 53 of the cases. See Report of the Chairman of the Administrative Conference of the United States on Agency Activities Under the Equal Access to Justice Act (Oct. 1, 1989-Sept. 30, 1990).

[144] In addition, the change would prevent the government from channeling--or appearing to channel--its efforts into blocking fees for less favored public interest attorneys.

Transforming the EAJA to automatic fee shifting in the social security context is normatively appealing. First, the change to automatic fee shifting would provide an incentive for private attorneys to accept small individual benefit claims under both Title II and Title XVI of the Social Security Act.[146] Under contingency fee arrangements, most beneficiaries with strong claims of significant size can obtain an attorney, if they desire, to press their claims. For instance, Title II of the Social Security Act, which is an insurance program, directs the SSA to withhold from any judgment a reasonable fee, not to exceed 25% of back disability benefits awarded,[147] thus ensuring counsel a guaranteed payment mechanism. Moreover, the likelihood of prevailing in a disability case under Title II is quite strong, with many specialized attorneys expecting to prevail in 80% of the challenges they bring.[148] Although the contingency fee may be quite generous if the back benefits owed are substantial, a 25% award might be insufficient to attract counsel if the back benefits at stake are small. Converting to automatic fee shifting under the EAJA therefore will encourage counsel to represent beneficiaries with small disability claims who cannot attract counsel through contingency fee arrangements.[149]

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[145] The system is simply too vast. In fiscal year 1989, for example, there were over 300,000 requests for hearings before ALJs, 61,000 requests for review before the Appeals Council, and almost 8,000 cases filed in district court. Given the approximately $200 billion in total payments that year, the added cost in EAJA fees is de minimis and therefore cannot be expected to induce change. Social Security Administration 1990 Annual Report to the Congress. Moreover, because substantial efforts have already been devoted towards improving the accuracy and efficiency of the system, it may be somewhat optimistic to think that awarding EAJA fees in more cases each year will prompt HHS to consider new ways to improve the system. See generally J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil, M. Carrow, Social Security Hearings & Appeals (1978) ("Social Security Hearings"); see also Pierce, *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron & Mistretta*, 57 U. CHI. L. REV. 481 (1990).

Nonetheless, the Appeals Council in recent years has begun to review more denials on its own motion before a civil case can be filed. See Social Security Administration 1991 Annual Report to the Congress 13 (Appeals Council has accepted more appeals to ensure "legally defensible hearing decisions"). That action might in part be explained by HHS' awareness that weeding out bad cases may save the agency EAJA fees down the road.

[146] 42 U.S.C. §401, et seq. (Title II); 42 U.S.C. §1381, et seq. (Title XVI).

[147] §206(b), 42 U.S.C. §406(b). Courts currently construe the statutory language to permit a 25% award in almost every context, irrespective of the seemingly independent qualification that the award must be "reasonable." The Sixth Circuit, for instance, has held that awards up to twice the market rate should automatically be considered reasonable, but that any award in excess of that amount should be subject to special scrutiny. Hayes v. HHS, 923 F.2d 418 (6th Cir. 1990). See also Wells v. Sullivan, 907 F.2d 367, 368-72 (2d Cir. 1990) (approving award of 25% of judgment and discouraging HHS efforts to contest such awards).

Perhaps more importantly, automatic fee shifting would encourage counsel to pursue supplemental assistance claims under Title XVI of the Social Security Act, which is a welfare program. Although the definition of "disability" is the same under both provisions, claims under Title XVI differ from those under Title II in two fundamental respects. First, they are typically smaller,[150] and second, the payment mechanism under 42 U.S.C. §406(b) is not available,[151] thus eliminating an attractive feature of disability litigation. No one disputes that many beneficiaries with plausible claims under Title XVI cannot currently obtain counsel.

Thus, eliminating the substantial justification standard would directly advantage those beneficiaries pursuing small claims, which presumably is the category for which the EAJA is most needed. Although encouraging all small claims to be brought against the government might be inefficient--the judicial system cannot easily handle small claims effectively--encouraging individual benefit claims[152] from those who can least afford to be without benefits arguably is justified.

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[148] Claimants, both those who litigate pro se and those who retain counsel, ultimately prevail in approximately 50% of court cases. See Hayes v. HHS, 923 F.2d 418 (6th Cir. 1990) (estimating that social security attorneys are successful in 50% of the cases they file in court); see also note 153 infra.

[149] Prevailing parties currently may seek attorney's fees under the EAJA if the government cannot demonstrate that its position in the underlying litigation was substantially justified. The prospect of fees under the EAJA provides incentive in small cases if counsel can accurately predict the likelihood that the government lacked substantial justification in denying benefits. Eliminating the substantial justification standard would make the prospect of recovery more certain and thus, at least at the margin, encourage more suits. Unlike the award under the Social Security Act, fee awards under the EAJA must be paid by the agency out of appropriated funds. The attorney must return the lesser of the two awards to the client. 99 Stat. 186.

[150] The maximum monthly benefit currently is $422 per month. Social Security Bulletin Annual Statistical Supplement 4 (1991). In contrast, disability benefits are not strictly based on need, and thus can greatly exceed the SSI maximum. Almost one-half of all court cases involving benefit claims administered by the Social Security Administration involve SSI claims, at least in part. Social Security Administration 1991 Annual Report to the Congress 34.

[151] Bowen v. Galbreath, 485 U.S. 74 (1988).

[152] Applications for fees arising out of class actions should be resolved like any other nonindividual benefit claim. Class actions typically challenge policy formulated or implemented

Second, in light of evidence of underutilization of the EAJA by prevailing individual benefits claimants, the change to automatic fee shifting might be needed to give private counsel sufficient incentive to apply for EAJA fees. In fiscal year 1989, for example, there were approximately 6,000 claimants who prevailed as a result of court cases (predominantly disability and SSI), and most presumably would be eligible for EAJA fees.[153] Yet there were only 2,000 applications for fees in the target year.[154] Thus, roughly only one-third of eligible prevailing parties are pursuing fees through the EAJA. To be sure, part of the reason for the limited use of the EAJA may stem from self-selection--parties recognize that the government was likely substantially justified.[155] But much of the explanation--and my guess is most of it--centers on the lack of incentive for counsel representing disability claimants to file for EAJA fees.

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by the agency as opposed to the substantial evidence underlying a particular benefit determination. If the substantial justification standard is to be retained in other policy contexts, then it should apply in SSA class-wide litigation as well. SSA has estimated that 100 class actions currently are pending. Social Security Administration 1991 Annual Report to the Congress 13.

[153] The Social Security Agency reported in fiscal year 1989 that there were 6,616 final court decisions, of which it prevailed in 72% of the cases. However, the claimants prevailed in 80% of a similar number of remands. Thus, there were likely over 6,000 claimants who ultimately prevailed. There were fewer final court decisions and remands in fiscal year 1990, according to the agency because of the Appeals Council's more aggressive position in accepting more appeals to forestall successful court actions. See Social Security Administration 1991 Annual Report to Congress 13.

[154] The applications for fees considered in the study did not necessarily arise from all cases decided during fiscal year 1989 because of delays from remands, delays in deciding the fee applications, etc.

[155] I simply doubt that the self-selection explanation has much bite. Private parties recognize that the Secretary has already been held to be unsupported by substantial evidence, and that they enjoy somewhat greater than an 85% statistical chance that a court will find that the government's position was not substantially justified.

Because of the ethical problems I discuss at text accompanying notes 155-60 infra, the District of New Jersey, among others, requires all prevailing HHS claimants who are represented by counsel to file for fees under the EAJA. In re Standing Order in Social Security Cases, Misc. 85-465 (D.N.J. Dec. 27, 1985); Taylor v. Heckler, 608 F. Supp. 1255 (D.N.J. 1985). See also Dowdy v. Bowen, 636 F. Supp. 591 (W.D. Mo. 1986); Sumler v. Bowen, 656 F. Supp. 1322, 1338-39 (W.D. Ark.), aff'd, 834 F.2d 711 (8th Cir. 1987). In the target year, Social Security Administration records reveal that 42 EAJA cases were resolved in the district, and that the private party prevailed in 37 of those cases, which replicates the same success ratio in all the HHS cases. The Middle District of Florida similarly requires all prevailing claimants to file for EAJA fees or provide an explanation for not doing so. Knagge v. Sullivan, 735 F. Supp. 411, 415 (M.D. Fla. 1990). In the target year, private parties succeeded in 22 of 24 EAJA cases, though the average award was smaller than elsewhere. Thus, the self-selection explanation probably has only limited validity.

Currently, the intersection of a contingency fee system with the EAJA creates perverse incentives. Even if attorneys believe that the government's position has been unjustified, they may decline to seek fees under the EAJA. To begin with, the 25% (or less) counsel receive from their clients as approved under the Social Security Act may well exceed the lodestar (calculated at $75 per hour plus the cost of living) for which they would be eligible under the EAJA. Litigating the EAJA claims, therefore, will not result in any benefit to counsel, and counsel have little incentive to pursue such EAJA claims, particularly given the risk that they would be found ineligible for fees, and thus forfeit all work devoted to the EAJA claim. Moreover, even if the 25% award is comparable to what could be recovered under the EAJA, the private attorneys face the risk of losing the EAJA case, and the loss probably cannot be chargeable to their impecunious clients.[156] An EAJA application might also delay payment of attorney's fees under the Social Security Act because judges not infrequently decide the issues together.[157] From a cost-benefit perspective, therefore, it may not be worth the private attorneys' time to pursue the EAJA remedy, even when the government has not been substantially justified. As a result, the social security claimants suffer and, conversely, the coffers of SSA benefit. Indeed, judges in a number of jurisdictions have required benefit attorneys to file claims in each case in which the claimant prevails to ensure that such attorneys do not take the easy way out to the detriment of their clients.[158]

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[156] While the prospect of fees on fees creates some countervailing incentive to seek fees under the EAJA, the prospect of a loss--particularly when the original award was generous--deters private attorneys from seeking EAJA fees. This same conflict of interest can arise under the EAJA whenever private counsel can recover more from the client than they can from the government. It is particularly acute in contingency fee cases because counsel are not paid by the hour and thus may receive no compensation for litigating the fee question.

[157] Combining the attorney fee mechanisms in the EAJA and the Social Security Act presents an attractive option, but one which is fraught with difficulty unless substantial revisions are made. As an initial matter, many would oppose the interference with private contract if the EAJA completely supplanted the private contract between client and attorney. Moreover, if the EAJA compensated all prevailing parties at a level replicating a market contingency fee, then the problem of providing incentive for counsel to accept small cases would remain. At the same time, a prospect of overcompensating attorneys would exist in several contexts. First, the SSA would pay more than it currently does in those cases in which substantial back benefits are awarded, and second, payment on a percentage basis might overcompensate those attorneys--particularly legal services attorneys and those paid for by insurance plans--who do not face risk of nonpayment from accepting a social security case. A further difficulty would arise given that fees for work in administrative proceedings are currently available under the Social Security Act but not under the EAJA.

[158] See note 155 supra.

Converting to an automatic fee shifting system would minimize the ethical quandary faced by social security counsel.[159] Even when the amount recovered under a contingency contract would exceed the EAJA award, the EAJA award would offset some of the attorney's fees that the claimant must otherwise pay to his or her attorney.[160]

Third, the shift would spare the government as a whole significant administrative expense, because the question of substantial justification--which is the only disputed question in much EAJA social security litigation--would not arise. The issue of the appropriate number of hours and rate (if beneath the fee cap), should be readily determined because both sides will likely develop sufficient familiarity with social security cases to gauge the reasonableness of hours expended in a given case. In fact, anecdotal evidence suggests that currently in some jurisdictions there is no dispute over the reasonable number of hours expended in disability cases.[161] Although the savings in expenses would not fully compensate for the increased EAJA awards paid by the Social Security Administration, the SSA would in all likelihood currently be paying more but for the private attorneys' self-interested decision to forego the EAJA route.

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[159] Even with automatic fee shifting, some counsel might not bother to file for fees since they stand to gain nothing from the hours expended. Because counsel must return the lesser of two fee awards to the client, there is scant incentive for litigating under EAJA if the EAJA award is not likely to be greater than the one under the Social Security Act. When the EAJA award is less than the private fee arrangement, the problem is exacerbated if courts require prevailing parties' counsel to return fees on fees for the EAJA litigation as well as fees for the underlying litigation. Counsel should at a minimum be able to keep that part of the fee award attributable to the fee litigation, since such compensation does not represent "fees for the same work." 99 Stat. 186.

A requirement that all prevailing social security claimants file for EAJA fees, as in the District of New Jersey, is problematic, however, given that private counsel would be forced to initiate litigation for which they might not even receive compensation. Cf. Venegas v. Mitchell, 110 S. Ct. 1679 (1990) (articulating norm against interference with contract between plaintiff and counsel in §1988 suit).

[160] The fact that only one-third of prevailing parties in individual benefit cases file for EAJA fees is particularly startling given the substantial percentage of SSI cases included. Counsel for SSI claimants should have greater incentive to file for EAJA fees given the smaller size of the claim and the fact that no payment mechanism exists. Thus, the percentage of successful Title II disability claimants who file for EAJA fees likely falls well uder 33%.

Underutilization also might arise from a lack of information. Some corroboration for this explanation lies in the fact that, according to SSA, the percentage of prevailing claimants who file EAJA petitions has gradually increased in the past several years. The heightened awareness may be attributable in part to Supreme Court cases such as Commissioner, INS v. Jean, 496 U.S. 154 (1990), and Sullivan v. Hudson, 490 U.S. 877 (1989), which received considerable publicity in the social security community.

[161] In other jurisdictions, however, there is little cooperation between attorneys and Assistant United States Attorneys, and agreement cannot always be reached on the pertinent amounts. To the extent that such inability to compromise is attributable to private attorney overreaching, the offer of judgment device should aid the government. And to the extent that the disagreement is attributable to the government's intransigence, the automatic fee shift means that the private

Moreover, there would be substantial savings in judicial resources. More than 2,000 cases were resolved (through litigation and settlement) involving EAJA applications in the target year, and while most cases were probably resolved quickly, the aggregate takes a toll on the already overloaded judicial system. Automatic fee shifting would minimize that burden.[162]

Fourth, there is little fear of overdeterring social security decisionmakers.[163] In evaluating disability, HHS officials recognize that disability determinations will be overturned only if there is not substantial evidence in the record. That substantial evidence standard creates a type of safe harbor--determinations at the margins of the statutory standards should be upheld.[164] Officials determining eligibility for benefits should not be chilled by the prospect of fees from making close calls because they are protected by a deferential standard of review.[165] Indeed, because the substantial justification standard is so close to the substantial evidence standard, the EAJA approaches an automatic fee shifting statute today,[166] and statistics demonstrate that

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attorney will ultimately be compensated for any protracted litigation over the proper amount of the award.

[162] The 2,000 fee cases resolved represent 3% of all civil cases involving the government resolved each year. Annual Report of the Director of the Administrative Office of the United States Courts 172 (1989). That percentage is somewhat misleading given the relatively few resources needed to adjudicate EAJA cases in comparison to antitrust cases, malpractice cases, etc.

[163] Indeed, as mentioned earlier, there is scant reason to believe that the change will lead to any significant deterrence at all. See note 145 supra.

[164] This is not to ignore that courts might be applying a standard far more strict than the substantial evidence standard. Courts may be sympathetic with individual benefits claimants even if they otherwise manifest a pro-government bias. Nonetheless, the possibility of judicial misapplication exists not only in this context but in determining the merits of the underlying lawsuit between the government and private party as well as in determining the substantial justification of the government's position. It is impossible to ascertain to what extent courts are fulfilling their statutory mandate. Recommendations for structuring a fee shifting mechanism are predicated on courts' good faith, even if erroneous, application of the governing legal principles.

[165] One study found that HHS ALJs were not even concerned with the prospect of judicial review, let alone the prospect of an EAJA award. Social Security Hearings, supra note 145, at 139-40 (ALJs not deterred by prospect of judicial review, given the modest (7%) percentage of cases that are appealed).

[166] To be sure, courts have uniformly held in the wake of *Pierce v. Underwood* that a finding of substantial evidence cannot be equated with a lack of substantial justification. The failure of the Secretary adequately to explain his decision or his reliance upon conflicting testimony may be

correlation.[167] In the target year, 85% of EAJA applications in social security cases were granted, and some were denied for reasons other than substantial justification, such as lack of timely filing.

Finally, eliminating the substantial justification standard arguably comports with corrective justice principles. Courts only overturn the Secretary's denial of benefits when the determination lacks substantial evidence. Even though the government's position may not lack substantial justification, the government's determination plausibly can be considered wrongful if it is not supported by substantial evidence. The substantial evidence standard itself establishes a fault standard, though at a lower threshold than the substantial justification test. Awarding fees for erroneous denials, therefore--at least in the vast majority of disability cases--provides compensation when the government has been at fault. Even those who believe that the government is not necessarily at fault when claimants prevail might conclude that the cost (and difficulty) of identifying those cases is too prohibitive given that there is so little fear of overdeterrence. Moreover, even when the government is not at fault, corrective justice principles might suggest that the claimants' loss itself is wrongful, because the government has deprived beneficiaries of a statutory entitlement and enjoyed the use of the money in the interim.

Thus, because of the strong case for distributive justice, because so many social security claims involve small, strong claims, and because there is little fear of overdeterrence, prevailing parties in individual benefits litigation should be entitled to fees irrespective of the substantial justification of the government's position.

D. Minimizing Litigation Costs

If the EAJA is to be retained--irrespective of whether the substantial justification standard is rescinded--several changes should be made to minimize litigation costs and facilitate settlement. Settlement of EAJA claims can be facilitated in two ways. First, Congress should enact an offer of judgment provision to encourage government counsel to make an offer of judgment on the EAJA claim immediately upon losing a case. If the private party rejects the government's offer and then does not receive more than that offer after

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reasonable, even if not supported by substantial evidence. See, e.g., Hadden v. Bowen, 851 F.2d 1266 (10th Cir. 1988); Taylor v. Heckler, 835 F.2d 1037 (3d Cir. 1987); Pullen v. Bowen, 820 F.2d 105 (4th Cir. 1987); Cohen v. Bowen, 837 F.2d 582 (2d Cir. 1988). Nonetheless, a safe harbor exists by virtue of the deferential standard of review, minimizing the fear of overdeterrence.

[167] See text accompanying notes 113-14 supra.

judgment, it cannot recover any fees or expenses incurred after the offer. Second, the prospect of settlement should be furthered by eliminating as many ambiguous provisions in the Act as possible. The need for bright-line rules to reduce collateral litigation is clear.

1. Offer of Judgment Provision

To promote settlement, Congress should adopt an offer of judgment device to grant the government leverage to force settlement. With an offer of judgment device, defendant's formal offer of settlement exposes the other party to financial consequences should that party reject the offer and then not recover more at trial. Currently, Rule 68 of the Federal Rules of Civil Procedure provides that "[a]t any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party . . . [and] [i]f judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." Rule 68 applies primarily to costs incurred by both sides such as witness fees and transcripts, but it does not usually cover attorney's fees.

In general government litigation, therefore, if a private litigant rejects a settlement offer by the government and then does not do better at trial, the government need not pay that party's post-offer costs, and the private party will be liable for any costs generated by the government after the offer. Rule 68 is likely to be effective only in complex litigation situations when the costs are quite large. Perhaps Rule 68 would foster settlement in complicated Medicare reimbursement suits or in large contract actions before the Claims Court. But Rule 68 would be of little help in most government litigation because the costs are unlikely to be large enough to give the government leverage to force early settlement.

An offer of judgment device could, however, include attorney's fees as well as costs. The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988, treats attorney's fees as part of costs.[168] Governmental defendants in civil rights suits currently can exercise leverage over plaintiffs by making an early formal settlement offer, and thereby forcing plaintiffs to continue litigating at peril of sacrificing their post-offer costs, and more importantly, their post-offer attorney's fees.[169] The EAJA could thus similarly be amended to permit the federal government to make an offer of judgment which, if not improved upon at trial, would cause the private party to forfeit its post-offer attorney's fees. An amended, Rule 68 could have bite in litigation with government involving considerable money such as in complicated Medicare reimbursement disputes. But those cases represent only a sliver of government litigation, for the vast majority of cases involve nonmonetary issues, denials of benefits in which the amount at stake is not in dispute, or affirmative litigation filed by the government in which the offer device likely would not be relevant. Thus, even if Rule 68 or a similar procedure permitted shifting attorney's fees as well as costs, it would not be effective in streamlining resolution of the underlying contest between the government and private party.[170]

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[168] The Federal Advisory Committee on Civil Rules proposed that Rule 68 be expanded generally to encompass attorney's fees. The proposal was rejected, in part because of the fear that strengthening Rule 68 would undermine Congress' overall intent to promote fee shifting. See Rowe & Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, 51 LAW & CONTEMP. PROBS. 15 (1988, issue No. 4) (hereinafter *Empirical Research*).

Nonetheless, Rule 68--or a comparable provision--might have substantial impact if applied to the collateral attorney fee dispute itself.[171] The fee dispute concerns only money, and thus an offer of judgment device can effectively streamline the litigation. After losing a case, government attorneys could immediately assess the government's fee exposure, and make a settlement offer that would compel the private party to accept the offer at risk of jeopardizing all post-offer fees on fees and of liability for government costs.[172]

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[169] Courts have, however, rejected the possibility that a civil rights plaintiff must pay the defendant's post-offer fees, as they do costs. See, e.g., Crossman v. Marcoccio, 806 F.2d 329 (1st Cir. 1986). They have reasoned that such fee shifting would undermine Congress' underlying decision to encourage suits. See also Marek v. Chesny, 473 U.S. 1 (1985) (upholding applicability of Rule 68 in Section 1988 context); Kirchoff v. Flynn, 786 F.2d 320 (7th Cir. 1986) (remarking upon defendant's incentive to use offer of judgment device in civil rights context).

[170] An offer of judgment device may apply in nonmonetary contexts a well, but not very effectively. See Simon, *The New Meaning of Rule 68:* Marek v. Chesny *and Beyond*, 14 N.Y.U. REV. OF L. & SOC. CHANGE 475, 485-91 (1986).

[171] There are no reported cases addressing whether Rule 68 applies today to purely collateral proceedings such as an attorney's fee dispute. There is nothing in the language or structure of the provision, however, that would militate against its application. In any event, whether or not Rule 68 currently applies to attorney fee disputes, the EAJA could be amended to provide explicitly for an offer of judgment rule.

[172] The most obvious impact of applying an offer of judgment rule to fee proceedings would be to benefit the government. See Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUD. 93, 118-21 (1986) (hereinafter *An Economic Analysis of Rule 68*) (noting that rule operates to redistribute wealth from plaintiffs to defendants). As a package with the change to automatic fee shifting, however, private parties would benefit overall. If the substantial justification standard is retained, however, the fee cap might be lifted somewhat in exchange for enactment of the offer of judgment device.

Although academics disagree in part,[173] operation of offer of judgment rules will likely foster settlement in many cases. Implementation of the rule minimizes any incentive that prevailing parties have to prolong the litigation. The economic literature also suggests that, irrespective of whether settlement is ultimately facilitated, the settlements which are concluded should come at an earlier point in the litigation, minimizing the total litigation costs.[174]

Assume, for instance, that a prevailing party claims attorney's fees of $16,000 for the litigation, and estimates that its fees in litigating the issue will amount to $2,000. It believes it has a 60% chance of collecting the full amount, and a 100% chance of collecting the $12,000 which the government is not contesting. In turn, assume the government estimates that it has a 60% chance of minimizing fees, believing the claim to be inflated by 25%, and assume that it estimates that its litigation costs would be $1,500. In the absence of an offer of judgment device, the private party estimates that it probably will receive $14,400 for its claim, plus nearly all of its $2,000 in fees after litigation.[175] Thus, it may not accept a settlement offer of $14,000, unless it is risk averse. The government for its part anticipates that, should it go to trial, it will lose $1,500 in its fees, $13,600 for fees for the underlying litigation, and also $2,000 for the private attorney's fees, for a total of $17,100. If the government officials were acting rationally, they would pay off the entire amount requested immediately, irrespective of the possibly padded claims, and save money. There would obviously be great pressure against such a course of action, for fear of encouraging false or at least dubious claims against the treasury. Refusal to settle, however, as in the Department of Agriculture case discussed earlier, would likely be financially foolhardy.

The offer of judgment device would change the calculus considerably, shifting the range in the government's favor. Assume that the government makes an early settlement offer of $14,000. If the private party litigates, it estimates only a 60% chance of exceeding that figure, and with it a 40% chance of losing $2000 in fees. Thus, assuming it must compensate counsel for extra work, its expected gain from trial would then diminish to $13,600, and it should rationally accept the offer of settlement.[176] Some private parties might still insist on litigating, but most parties would accept the settlement offer, and avoid the risk of less recovery should the parties go to trial. The offer of judgment device may have the effect of forcing plaintiff to decide whether to settle apart from the question of defendant's possible loss from proceeding to litigation.[177]

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[173] Compare *An Economic Analysis of Rule 68*, supra note 172, 15 J. LEGAL STUD. at 110-16 (concluding that there should be only a slight effect on settlement) with *Predicting the Effects*, supra note 21, 47 LAW & CONTEMP. PROBS. at 169 (suggesting a broader impact).

[174] Early empirical research suggests that the offer of judgment rule may well bring parties to settlement earlier. *Empirical Research*, supra note 168, 51 LAW & CONTEMP. PROBS. at 13, 30; *Predicting the Effect*, supra note 21, 47 LAW & CONTEMP. PROBS. at 168.

[175] Although the private party could recoup the $2,000 after trial, that amount may not represent a gain because it presumably must pay counsel for the work. This calculation may be complicated by the fee arrangement the private party may have concluded with counsel.

Despite the benefit to the government, the offer of judgment device might not facilitate settlement if the government lowers its settlement offers in light of plaintiff's increased risk. Yet some increase in settlements is to be expected for two reasons. First, because the government does not internalize its litigation costs, it will rarely if ever offer to settle a case for more than a private party can claim entitlement. The offer of judgment device shifts the settlement range downwards, thus making settlement possible in more cases. Second, because many private parties eligible for fees under the EAJA are small, they may well be risk averse, and thus more likely to accept even low-ball government offers, for fear of jeopardizing fees.[178] Moreover, the offer of judgment device should "smoke out" realistic settlement offers from the government at an earlier stage in the fee litigation, and thus minimize overall litigation costs.[179] Thus, whether or not the substantial justification standard is retained, an offer of judgment device could well reduce overall litigation costs by promoting settlement.

2. Minimizing Issues for Litigation

In addition to enacting an offer of judgment device, Congress could amend other provisions in the EAJA to minimize collateral litigation. The need for bright-line standards is clear.

Enhancements. Under the Act, private attorneys may argue that they merit greater than the $75 per hour statutory limit if they can point to a "special factor, such as the limited availability of qualified attorneys for the proceeding involved."[180] Like the substantial justification standard, the enhancement provision creates uncertainty, diminishing the likelihood of settlement and increasing overall litigation costs. Conequently, the provision allowing special enhancements should be excised.

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[176] To be sure, the government's expected loss after trial still exceeds the private party's expected gain ($15,900), but it is doubtful that the private party could extract more than its expected gain from the government, given that the government's expected loss at the moment of settlement is significantly less, because it has yet to incur costs of litigation.

If the private party's stake in settling increased to include liability for the government's post-offer attorney's fees, then there would be a further shift in the range, with the plaintiff now expecting to gain $13,000 from the litigation, and the government expecting to lose $15,000.

[177] The private party will likely settle when $oj \geq p - (1-q)a$, where oj = the offer of judgment; p = the private party's expected fee recovery; q = its chance of exceeding the offer of judgment; and a = its projected attorney's fees in contesting the dispute over the fee award.

[178] Explaining Constitutional Tort Litigation, supra note 25, at 755.

[179] For a proposal to expand present Rule 68 in tort cases, see *Enterprise Responsibility*, supra note 66, at 283-89.

Courts have understandably been reluctant to find that particular attorneys qualify under the enhancement provision for fear of allowing the exception to swallow the rule. Because there is arguably a shortage of qualified attorneys at the $75 per hour rate in most major markets across the country, following the plain language of the enhancement provision might permit enhancements in almost every case. The Court in *Pierce v. Underwood*[181] limited enhancements to situations in which counsel had some distinctive knowledge or skill, the special skill was required in the underlying litigation, and counsel with such qualifications could not be obtained at the capped rate. Although the Court indicated that patent attorneys should qualify for the enhancement,[182] government attorneys have successfully combatted enhancements for their private counterparts who have expertise in appellate matters, in social security matters, and in foreign languages.[183] Nonetheless, the possibility of enhancements creates uncertainty and, even after *Underwood*, provides grist for prolonged disputes between private counsel and the government.[184]

The "special factors" language merely invites continued litigation, forestalling settlement of the fee issues and undermining the benefits of a bright-line fee cap. Moreover, the need for enhancement is questionable, given that the EAJA only rarely serves to induce litigation, and only then in small, strong cases. In any event, no attorneys, with the exception perhaps of those litigating social security cases, can currently expect even close to market rates from the EAJA. To the extent that exceptions to the fee cap are warranted, they should be spelled out by Congress, whether for patent attorneys, those specializing in foreign languages, etc. Perhaps the fee cap should be raised, but the benefits from a bright-line rule in this context plainly outbalance the possibility that some private parties will not be able to obtain qualified counsel.

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[180] 28 U.S.C. §2412(d)(2)(A).

[181] 487 U.S. 552 (1988).

[182] *Id.* at 572.

[183] Phillips v. GSA, 924 F.2d 1577 (Fed. Cir. 1991) (denying enhancement for *pro bono* representation and for contingency fee arrangements); Chynoweth v. Sullivan, 920 F.2d 648 (10th Cir. 1990) (knowledge of social security disability law was not a special factor); *Jean v. Nelson*, 863 F.2d 759 (11th Cir. 1988) (denying enhancements for *pro bono* representation as well as for those specializing in immigration law), aff'd on other grounds, 110 S. Ct. 2316 (1990).

[184] See, e.g. United States v. 313.34 Acres in Jefferson County, 889 F.2d 814 (9th Cir. 1989) (suggesting possibility of enhancement in condemnation cases); National Wildlife Fed'n v. FERC, 870 F.2d 542 (9th Cir. 1989) (awarding enhanced fees in light of specialized training in environmental and regulatory issues); cf. Oklahoma Aerotonics, Inc. v. United States, 943 F.2d 1344 (D.C. Cir. 1991) (awarding enhancement for judicial delay in resolving EAJA dispute).

Cost of Living Increases. The Act also provides that the $75 per hour fee cap can be raised "if a court determines than an increase in the cost of living ... justifies a higher fee."[185] Because the cap understates--and should understate[186]--the prevailing market rate for attorney's fees, courts currently award a cost-of-living increase in almost all cases arising out of federal court litigation, with current rates approaching $110 per hour.[187] Nonetheless, litigation has arisen with increasing regularity over which subcategory in which index to use in calculating the cost-of-living increase.[188] The issue could easily be clarified if Congress selected the precise method or precise index category courts should use in calculating the increase.

Moreover, courts have split as to when the cost-of-living increase is applicable--for instance, whether it should be calculated as of the date the work is performed, or as of some later date.[189] Although several dates are possible, choosing the date either when the application is filed or when judgment is entered creates a bright-line rule which would simplify the calculation and compensate a private party to some extent for the delay in payment, *e.g.*, payment in 1992 for work performed in 1986.[190] In any event, the date should be specified to narrow the issues for litigation and enhance the prospects for settlement.

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[185] 28 U.S.C. §2412(d)(2)(A).

[186] The benefit of a bright-line cap would be lost if the cap were too high. The government would then have the incentive, in many cases, to argue that the prevailing market rate was in fact *lower* than the capped rate. To avoid that litigation, the cap should be set at the low end of the spectrum of market rates for attorneys. In other words, the statutory amount resembles more of a flat rate than a cap.

[187] See, e.g., Perales v. Casillas, 950 F.2d 1066 (5th Cir. 1992).

[188] See, e.g., Perales v. Casillas, 950 F.2d 1066 (5th Cir. 1992); Russell v. Sullivan, 930 F.2d 1443, 1446 (9th Cir. 1991); DeWalt v. Sullivan, No. 91-5199 (3d Cir. April 24, 1992); Malick v. Heckler, No. 85-4946 (E.D. Pa. Jan. 9, 1989); Harris v. Sullivan, No. 87-4376 (S.D.N.Y. Sept. 4, 1991).

[189] Compare Perales v. Casillas, 950 F.2d 1066, 1076 (5th Cir. 1992) (cost-of-living increase should be calculated as of date work performed); Chiu v. United States, 948 F.2d 711 (Fed. Cir. 1991) (same), with Garcia v. Schweiker, 829 F.2d 396, 402 (3d Cir. 1987) (calculation should be made as of date on which plaintiff became a prevailing party).

[190] See Garcia v. Schweiker, 829 F.2d at 402 (attorneys "should not have the purchasing power of their fees eroded by such inflation"); cf. Missouri v. Jenkins, 491 U.S. 274, 278-84 (1989) (authorizing courts in Section 1988 litigation to use current rates to compensate for delay).

Timeliness of Fee Petition The Act at present requires prevailing parties to file an EAJA application within 30 days of "final judgment." A statute of limitations ordinarily should not give rise to excessive litigation. But the seeming simplicity of "final judgment" is unfortunately beguiling. In the context of judicial remands to agencies, it is extremely difficult to determine when final judgment occurs, and when a district court retains jurisdiction over remands to agencies. Indeed, under two recent decisions by the Supreme Court, *Melkonyan v. Sullivan*[191] and *Sullivan v. Finkelstein*,[192] private parties may be forced to file a protective EAJA petition upon judicial remand to an agency before the party can possibly know whether it has prevailed.

In *Melkonyan* the Court held that the term "judgment" in the EAJA refers to a court judgment, not the decision of an administrative agency. In individual benefits litigation, and to some extent in all agency adjudications, courts not infrequently remand challenges to agency action back to the agency for further development. For instance, in fiscal year 1990, the Social Security Administration reported that there were 4,761 final court decisions involving individual benefit claims, and an additional 4,343 court remands were processed, in which the claimant ultimately prevailed in 62% of the cases.[193] Most of those remands, under the Court's reasoning in *Finkelstein*, constitute final judgments. Thus, the 30-day filing limitation in most remanded agency cases is triggered not by a favorable agency decision upon remand, but by the district court decision ordering remand in the first instance. Compounding the problem, district courts have not clarified at the time of remand whether they retained jurisdiction (or could under *Melkonyan*) over the case. To protect their eligibility for fees, therefore, private parties whose cases are remanded to agencies must file an EAJA petition at that time even though they have yet prevailed in the litigation. Not only is such a course wasteful, but many claimants may forfeit their claims by falling into the trap inadvertantly laid by the Court's decisions. The confusion engendered by *Melkonyan* and *Finkelstein* is not surprising.[194]

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[191] 111 S. Ct. 2157 (1991).

[192] 110 S. Ct. 2658 (1990).

[193] Social Security Administration, 1991 Annual Report to the Congress 34. The difficulty of ascertaining when a district court retains jurisdiction is not limited to social security contexts, even if the problem is far more acute in that setting. See Lydon v. Howerton, 731 F. Supp. 1545, 1551-53 (S.D. Fla. 1990) (rejecting INS' position that EAJA application filed after completion of remand proceedings was untimely).

[194] HHS officials estimated that hundreds of courts have grappled with the timeliness question after *Melkonyan*. See, e.g., Richard v. Sullivan, 955 F.2d 354 (5th Cir. 1992); Guttierez v. Sullivan, 953 F.2d 579 (10th Cir. 1992); Welter v. Sullivan, 941 F.2d 674 (8th Cir. 1991); Damato v. Sullivan, 945 F.2d 982 (7th Cir. 1991); Fergason v. Sullivan, 771 F. Supp. 1008. 1012-13 (W.D. Mo. 1991) ("As a consequence of the Supreme Court's [decisions], a claimant

The confusion can be alleviated in several ways. First, the 30-day filing limit could be excised, replaced by a requirement that the private party indicate its intent to apply for EAJA fees in its complaint, answer, or other pleading,[195] as is the practice in the vast majority of other fee shifting statutes.[196] Private parties of course have substantial financial incentive to file as expeditiously as possible, and there is no reason to believe that such parties can achieve strategic advantage through delay. The government benefits financially from any delay unless, for some unusual reason, the delay deprives it of the evidence with which to demonstrate substantial justification. District courts could dismiss any EAJA application that disadvantaged the government as barred by laches. Changing the filing requirement could considerably simplify EAJA litigation without infringing upon the government's legitimate interests.

Alternatively, Congress could amend the definition of "final judgment" in 28 U.S.C. §2412(d)(2)(G) to include final agency determinations made after judicial remand in social security or all settings. The term "final judgment" itself could be changed to final disposition to highlight the difference. Although some ambiguity doubtless would remain, the change would eliminate at least most of the litigation spawned by *Melkonyan* and *Finkelstein*, obviating the necessity of duplicative filings. Altering the statute of limitations, therefore, as with the other changes addressed, should minimize litigation costs and, by removing subjects of contention, pave the way for settlement.

Conclusion

The Equal Access to Justice Act is the product of an uneasy compromise. Congress sought to encourage meritorious litigation against the government which would not proceed without the prospect of fee shifting, and it hoped that the possibility of fee shifting would deter government wrongdoing. At the

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whose case is reversed and remanded for further proceedings likely will find that by the time s/he becomes a 'prevailing party' the time for filing has long since run").

[195] Because of the prior notice, Congress could then consider authorizing judges and agency hearing officers to determine the fee issues at the same time that the merits of the underlying action are resolved. By the time the merits are resolved, the decisionmaker should be familiar enough with the issues in the case to assess whether the government's position was substantially justified. Although the decisionmaker might request further briefing, or might believe that the fee application could be resolved on other grounds, authorizing a simultaneous finding as to underlying liability and exposure to fees could well minimize litigation in many instances and facilitate settlement.

[196] See, e.g., 42 U.S.C. §1988. By local rule, parties can be required to document their request for fees in a timely fashion after prevailing.

same time, it placed safeguards in the Act, most notably the substantial justification standard, to prevent overdeterring vigorous government policymaking and vigilant enforcement efforts.

The effort at compromise has yielded only limited benefits. The prospect of fee shifting has marginally encouraged private parties to contest government overreaching because most private parties have adequate resources and incentives to press their challenges, and because the Act in any event promises only a modest and very uncertain fee recovery. Moreover, the Act has probably had no impact on deterrence. Policymakers are unlikely to internalize the costs of litigation, let alone attorney's fees, and such actors have sufficient incentives currently to pursue only "reasonable" policy initiatives. The question is somewhat closer for those government officials implementing previously set rules for, despite the political controls established by each agency, they are not as constrained by internal deliberation and outside lobbying in making such fact-specific judgments, and are more likely to consider the overall litigation costs in determining the appropriate application of government policy in each successive case.

From a perspective of corrective or distributive justice as well, the Act has had only partial success. Many private parties who prevail in litigation against the United States have not been recompensed fully for their attorneys' fees, whether because they exceeded the size limitation in the Act, or because the government's position was substantially justified. Consistent with the American Rule on attorney's fees, some may believe that compensation for litigation costs is not mandated by principles of corrective justice. Others may believe the government should compensate private parties even when its position is substantially justified, because the government arguably is at fault when it misapplies a statutory standard or ignores critical evidence in the record. Still others may believe that compensation is required whenever the private party's loss is "wrongful," irrespective of the government's fault. Thus, while the Act has recompensed some private parties more fully for injuries they sustained at the government's hands, it does not necessarily embody principles of corrective justice.

Much of the Act's nonsuccess can be attributed to the substantial justification standard, which attempts to steer a course between appropriate deterrence and unwarranted chilling of government initiatives. While unquestionably safeguarding against overdeterrence, the standard diminishes the Act's ability to induce private parties to challenge governmental action, because the prospect of fees, even if the underlying claim is ultimately successful, is so uncertain. The standard also blunts whatever deterrence fee shifting would otherwise have because of government officials' reluctance to consider (despite the statistics) that judges *ex post* will view governmental action to be unreasonable. And, at the same time, the standard not only deprives some injured parties of compensation, but it encourages a second round of litigation for all private parties, which results in a significant loss to the taxpayer. The compromise of a substantial justification standard is understandable, yet theoretically flawed and practically cumbersome.

Ironically, either a total repeal or a change to automatic fee shifting could well constitute improvement. A repeal could save the government millions of dollars a year in payments to private attorneys, in government attorney salary, and in adjudicative resources. That savings could be channeled into more socially beneficial programs, if not directly passed on to taxpayers. Deterrence instead would be provided by political checks internal to the agencies, congressional oversight, and judicial review.

A change to automatic fee shifting could also improve the current system, most palpably from a distributive justice perspective. Although the change would undoubtedly cost the taxpayer more, the incremental difference would be moderated by a significant savings in litigation costs. An automatic fee shifting mechanism, coupled with an offer of judgment device, could force prompt settlement of the fee issues in most cases. Under such a system, private parties might have slightly more incentive to challenge governmental overreaching, and considerably more incentive to file for attorney's fees. Moreover, the government might be somewhat more deterred from wrongdoing because of its need to consider the prospect of attorney's fees in every case, particularly those involving fact-specific judgments. Overdeterrence, however, is unlikely due to the nonmonetary incentives confronting government officials and due as well to the protection afforded by deferential standards of review.

Whether or not the substantial justification standard is rescinded for general civil litigation involving the federal government, automatic fee shifting is warranted in fee litigation arising out of individual benefits claims, which accounts for the vast majority of EAJA disputes. Counsel, under privately arranged contingency fee contracts in disability cases, currently can claim up to 25% of any back benefits awarded. If counsel can also obtain an EAJA award, they must turn over the lesser of the two awards to their clients. The change would provide more incentive to social security counsel, who have unfortunately underutilized the EAJA, to pursue EAJA fees on behalf of their clients. A revised EAJA would encourage representation for smaller disability and nondisability claims as well, particularly those for which representation through contingency arrangements is not economically feasible. Moreover, the burden on the Social Security Administration would be partially offset by savings in litigation costs. Overdeterrence is not likely, however, because of the cushion already provided by the substantial evidence standard. And, even if the hope of improved governance through fee shifting is fanciful, fee shifting will help achieve more complete compensation for those with the greatest need.

Appendix

TABLE 1: DATA FOR SURVEY PERIOD

Type of Case	Cases (#)	Mean Hrs. of Private Counsel in Fee Dispute	Mean EAJA Request	Mean Award	% won by private party	% lost due to sub. just. finding	Max. % of EAJA Claim lost due to sub. just. finding
Court	20	64.1	$35,798.15	$21,691.70	70%	20%	38%[a]
Agency	28	74.1	$96,305.08	$41,963.31	73%	18%	2%
HHS	50	5.0	n/a	$4,536.60	84%	16%	12%

TABLE 2: MODEL FOR COURT CASES

# of Cases Used in Model	Mean Private Hours Recorded in Fee Dispute	Mean Gov't Hours Recorded in Fee Dispute	Mean Award	Mean Fee on Fee Award	Chance of Private Side Winning
4	56.4	72.0	$27,233.22	$5,179.44	100%

TABLE 3: MODEL FOR HHS CASES

# of Cases Used in Model	Mean Private Hours Recorded in Fee Dispute	Mean Gov't Hours Recorded in Fee Dispute	Mean Award	Mean Fee on Fee Award	Chance of Private Side Winning
14	5.7	6.4	$4,236.19	$419.34	93%

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[a] The 38% figure is largely attributable to one large case in which fees were denied because the government's position was substantially justified.

TABLE 4: MODEL FOR AGENCY CASES

# of Cases Used in Model	Mean Private Hours Recorded in Fee Dispute	Mean Gov't Hours Recorded in Fee Dispute	Mean Award	Mean Fee on Fee Award	Chance of Private Side Winning
8	93.1	58	$81,459.87	$6,419.93	75%

TABLE 5: MODEL FOR AGENCY CASES[a]

# of Cases Used in Model	Mean Private Hours Recorded in Fee Dispute	Mean Gov't Hours Recorded in Fee Dispute	Mean Award	Mean Fee on Fee Award	Chance of Private Side Winning
7	34.8	32.0	$25,136.35	$1,967.60	71%

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[a] Table 5 reflects the same data as does Table 4, excluding the one large claim of almost one million dollars.

Supplemental Report for Recommendation 92-5

The Equal Access to Justice Act: Should Its Coverage Be Expanded?

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I. Introduction

The issue addressed by this report is whether the Equal Access to Justice Act (EAJA), as it applies in the administrative context, should be amended to expand the range of cases where attorneys' fees are available. As described below, under current law, certain individuals and small organizations and businesses that prevail in adversarial administrative proceedings involving the federal government may have their fees reimbursed by the United States. The Supreme Court, in the recent case of *Ardestani v. INS*,[1] made clear that EAJA fees were potentially available only in cases where hearings were required by statute to conform to the procedural provisions of section 554 of the Administrative Procedure Act.

The question that now arises is whether such a limitation is a good one, or whether policy considerations suggest that the Act should be amended to expand the potential availability of fees to cases where administrative hearings are similarly formal, but where such formality does not derive strictly from section 554. Because the Supreme Court interpreted the statute to prohibit fee awards unless section 554 expressly governed the proceeding, any change is up to Congress.

Although there are several possible approaches, this report recommends that Congress carefully review administrative hearing programs and consider amending EAJA on a case-by-case basis as it determines that EAJA protections are appropriate in particular contexts.

II. Background

A. The Equal Access to Justice Act

The Equal Access to Justice Act is a limited fee-shifting statute. It has two parts: one applies to proceedings at the federal administrative level,[2] and one applies to cases in the federal courts.[3] This report is concerned only with the former. That portion of the Act provides that for certain adversarial administrative adjudications involving the United States or its agencies, certain prevailing private parties may recover costs and attorneys' fees if the government's position in the litigation was not substantially justified. Parties that are potentially eligible for fees include individuals with net worth less than $2 million, and businesses, organizations or local government entities worth less than $7 million with fewer than 500 employees.

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[1] _U.S._, 112 S.Ct. 515 (1991).

[2] 5 U.S.C. §504 et seq.

[3] 28 U.S.C. §2412 et seq.

The term "adversarial adjudication" is defined in the Act as "an adjudication under section 554 [of Title 5] in which the position of the United States is represented by counsel or otherwise . . . ."[4] Section 554, as described further below, is the portion of the APA that details the requirements for a formal administrative hearing.[5]

The Act provides a ceiling of $75 per hour reimbursement for attorney fees, unless an administrative agency by regulation increases the amount. No agency has done so.[6]

In enacting EAJA in 1980, Congress expressed its concern that "certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings."[7] Thus, EAJA's purpose was to provide reimbursement for certain fees and costs in litigation involving the government. According to the House Report, the EAJA

> rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy. An adjudication or civil action provides a concrete, adversarial test of Government regulation and thereby insures the legitimacy and fairness of the law. An adjudication, for example, may show that the policy or factual foundation underlying an agency rule is erroneous or inaccurate, or it may provide a vehicle for developing or announcing more precise rules. The bill thus recognizes that

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[4] The "represented by counsel" provision operates generally to exclude social security adjudication (at the administrative level) from coverage because the government is not represented.

[5] 5 U.S.C. §504(b)(1)(C).

[6] Agencies are required to issue uniform regulations governing procedures for submitting fee applications, and agencies are required to consult with the Administrative Conference in developing their regulations. Shortly after the Act was passed, the Conference issued model rules, first in draft, 46 Fed. Reg. 15895 (March 10, 1981), and later in final. 46 Fed. Reg. 32900 (June 25, 1981). These model rules, as amended in 1986, are reprinted at 1 CFR Part 315, and in ACUS, Federal Administrative Law Sourcebook.

[7] Pub. L. 96-481, §202(a).

> the expense of correcting error on the part of the Government should not rest wholly on the party whose willingness to litigate or adjudicate has helped to define the limits of Federal authority. Where parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable Government action and also bear the costs of vindicating their rights.[8]

B. Section 554 of the Administrative Procedure Act

Section 554 of the APA describes the procedures required for administrative hearings that are "required by statute to be determined on the record after opportunity for an agency hearing."[9] That section enumerates certain procedural requirements, and incorporates by reference additional requirements provided in sections 556 and 557. Among the procedural protections provided through section 554 are

- the right to timely notice of the time, place and nature of the hearing;

- notice of the legal authority and jurisdiction under which the hearing is to be held;

- notice of the matters of fact and law asserted;

- the opportunity for submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding and the public interest permit;

- if a controversy cannot be determined by consent, a hearing and decision;

- a prohibition against ex parte contacts;

- the taking of evidence to be presided over by either the head of the agency or one of the members of the body

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[8] H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S.C.C.A.N. 4984, 4988-90.

[9] 5 U.S.C. §554 (a). There are certain enumerated exceptions.

> comprising the agency or by an ALJ, which presiding officer(s) have certain authority, including the power to administer oaths; issue subpoenas otherwise authorized; receive and rule on evidence; regulate the course of the hearing; hold prehearing and settlement conferences; rule on procedural requests; and make or recommend decisions;
>
> - receipt of oral or documentary evidence except where irrelevant, immaterial or unduly repetitious;
>
> - right to present a case or defense, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts;
>
> - the availability of a transcript;
>
> - the right to submit proposed findings and conclusions, and exceptions and supporting reasons to recommended decisions;
>
> - a decision that includes findings and conclusions and the reasons or basis therefor, on all material issues;
>
> - certain requirements protecting the independence of the decisionmaker(s).

There are many statutes that invoke the section 554 procedures, generally through reference to the APA by using the language quoted above, "opportunity for a hearing on the record."[10] As noted, under the provisions of EAJA, participants in such hearings are potentially eligible for fee awards if the other statutory requirements are met.

There are also a number of programs where similar hearing procedures are required not by statute, but by agency regulation.[11]

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[10] E.g., 42 U.S.C. §1320-7a(c)(2) (civil penalties for Medicare fraud); 49 U.S.C. §1475 (d)(1) (civil penalties of air safety violations).

[11] E.g., 18 CFR §385.901 et seq. (FERC review of remedial orders).

C. *Ardestani v. Immigration and Naturalization Service*

In late 1991, the Supreme Court decided *Ardestani v. INS*,[12] which presented the issue of whether EAJA fees were available in cases where the procedures applicable to an adversarial administrative adjudication were virtually identical to those set forth in section 554, but where the proceeding itself (in this case a deportation proceeding), did not arise under section 554.[13] The Court interpreted the phrase "under section 554" to refer only to those cases statutorily subject to or governed by section 554. In doing so, it rejected the petitioner's argument that "Congress's only intent in defining adversary adjudications was to limit EAJA fees to trial-type proceedings in which the Government is represented . . . ."[14] The Court said that "[w]e must assume that the EAJA's unqualified reference to a specific statutory provision mandating specific procedural protections is more than a general indication of the types of proceedings that the EAJA was intended to cover."[15] In coming to this result, the Court relied on the lack of legislative history to support any wider reading of the statutory language, and on the general principle that waivers of sovereign immunity should be read narrowly.

In addressing the policy issue of whether a "functional interpretation of the EAJA is necessary in order to further the legislative goals underlying the statute," the Court noted that there is "no doubt that the broad purposes of the EAJA would be served by making the statute applicable to deportation proceedings."[16] While recognizing the complexity of deportation hearings, and the burden the plaintiff had to shoulder in a case where the INS position was not substantially justified, the Court held that "it is the province of Congress, not this Court, to decide whether to bring administrative deportation proceedings within the scope of the statute."[17]

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[12] __U.S.__, 112 S.Ct. 515 (1991).

[13] In *Ardestani*, the INS had sought to deport petitioner. At the hearing, petitioner successfully renewed a previously denied application for asylum. The immigration judge awarded EAJA fees. They were denied on appeal to the Board of Immigration Appeals.

In an earlier case, Marcello v. Bonds, 349 U.S. 302 (1955), the Supreme Court had held that deportation cases were governed by the Immigration and Nationality Act, rather than by the APA. The INA provisions relating to procedures for deportation hearings were adapted from the APA, although the INA permits non-ALJ adjudicators (immigration judges), who lack the statutory independence guaranteed to ALJs, to preside and make initial decisions. The applicable regulations conform the procedures to the APA even more closely, and the Department of Justice has administratively provided for the structural independence of immigration judges by placing them in an independent Executive Office of Immigration Review. 48 Fed. Reg. 8038-40 (1983). 112 S.Ct. at 519.

[14] Id. at 520.

[15] Id.

[16] Id. at 521.

Two justices dissented. They took the view that the meaning of the phrase "under section 554" was ambiguous, and should be interpreted "'in light of [the EAJA's] purpose to diminish the deterrent effect of seeking review of, or defending against, governmental action.'"[18] Noting that

> deportation proceedings exemplify the kind of adjudications for which Congress authorized fee awards: The alien's stake in the proceeding is enormous (sometimes life or death in the asylum context); the legal rules surrounding deportation are very complex; specialized counsel are necessary but in short supply; and evidence suggests that some conduct on the part of the Government in deportation and asylum proceedings has been abusive . . .[,][19]

the dissent stated its view that these concerns supported a broad reading of EAJA.

The Court's decision in *Ardestani* was based on statutory interpretation. Even the majority noted that the purposes of EAJA were consistent with a broader reading, but they believed that it is up to Congress to enact any such expansion. Thus, the ball is squarely in Congress' court.

III. Activity Under EAJA

The Equal Access to Justice Act has been on the books now for over 10 years. Under the statute, the Administrative Conference is charged with providing an annual report to Congress on the amount of fees and other expenses awarded during the preceding fiscal year.[20] These reports provide information about the costs of the Act, as well as the kinds of cases in which awards are given.

EAJA was first implemented in FY 1982,[21] and the first awards were made in 1983. Eight applications were granted at the administrative level that year, for a total of almost $36,000.[22] The number of applications granted has varied since then from a low of 8 to a high of 281, with an average of 56. The total amount of money paid in any one year across the federal government ranged from a low of $36,000 to a high of under $962,000, for a total since 1982 of $2,731,980.

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[17] Id.

[18] Id. at 522, quoting Sullivan v. Hudson, 490 U.S. 877, 890 (1989).

[19] Id. at 522.

[20] 5 U.S.C. §504(e).

[21] The Act was effective October 1981.

These numbers are not large, given the context of the federal budget. They are also substantially below the amounts projected by Congress at the time it passed the Act. The Congressional Budget Office estimated a cost for administrative adjudications of $19.4 million in FY 1982, $21.3 million in 1983, and $22.4 million for 1984.[23]

In the last several years, the largest number of fee awards has come in contract appeal cases.[24] In FY 1990, almost two-thirds of the fee grants (22 of 36) involved cases before boards of contract appeals. Unfair labor practice and enforcement cases were the bulk of the remainder.[25]

The majority of fee applications denied by agencies are denied on the basis that the government's position was substantially justified.[26] In 1990, only one case was denied on the basis that the proceeding was not an "adversarial adjudication" as defined by EAJA.[27] This fact does not say anything, however, about the number of cases for fees that might be brought if the particular type of proceedings were covered.

It appears that, in recent years, the majority of the successful applicants at the administrative level have been small businesses.

IV. Should EAJA Be Expanded?

The current EAJA process provides reimbursement for attorney fees for a limited but fairly well-defined group of cases. The number of awards that has been made over the span of the program has not been extraordinarily large.[28]

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[22] *See* Administrative Conference's Report of the Chairman of the Administrative Conference of the United States on Agency Activities Under the Equal Access to Justice Act (October 1, 1989--September 30, 1990), dated October 4, 1991 (ACUS 1990 EAJA Report). The figures discussed here derive from Appendix II.

[23] H.R. No. 1418, supra n. 8, at 23, 1980 U.S.C.C.A.N. at 5002.

[24] Congress expressly amended section 504(b)(1)(C) in 1985 to include certain administrative proceedings under section 6 of the Contract Disputes Act.

[25] ACUS 1990 EAJA Report, supra n. 22, at App. I.

[26] Id. at App. IV.

[27] Id.

[28] 454 awards were made between 1983 and 1990. ACUS 1990 EAJA Report, supra n. 22, at App. II.

The question is whether the scope of adjudications that are eligible for coverage under the Act should be expanded; and if so, to what extent.

A. Advantages of the Current System

As described above, EAJA currently authorizes award of attorneys' fees to certain private parties who prevail in adversarial adjudications with the federal government. The scope of eligible adjudications is limited to those where the proceeding is made subject to the provisions of section 554 of the APA by statute, and where the position of the government is represented by counsel. The status quo, now that its limits have been made clear by the Supreme Court, has the advantage that it is relatively easy to administer: there is a bright line between covered and non-covered proceedings.[29]

A further argument in favor of retaining the status quo is that restricting EAJA coverage to those proceedings where Congress has made the judgment that section 554 applies limits any disincentive an agency might otherwise have to provide formal proceedings voluntarily in other cases or programs. Assuming that in at least some circumstances, it is advantageous to the public that formal proceedings be made available, agencies are less likely to do so if in so doing, they potentially make themselves liable for attorneys' fees.

In addition, of course, the more limited the availability of fees, the lower the cost to the government, and ultimately, to the taxpayers. In these days of limited federal funds, this might be an important factor.[30]

B. Reasons for Change

There are, however, some good arguments in favor of amending the Act to expand its coverage. As the Supreme Court noted in *Ardestani*, deportation cases, which are not currently covered, are every bit as complicated as a section 554 proceeding, and the stakes are as high as they could be in the administrative context. Other types of proceedings, which have similarly formal procedures that govern them, provide the same types of barriers as those EAJA was enacted to overcome; i.e., the expense and time of litigating against the government, even where the government's action may be unreasonable. The Court in *Ardestani*, and some lower courts, even while adopting a narrow statutory interpretation of EAJA, have recognized that decisions based on policy considerations might have led to a different result.[31]

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[29] This is not to say that litigation over whether particular fee applications should be granted will be reduced. As the annual reports on EAJA prepared by the Administrative Conference show, the major issue in EAJA litigation at the administrative level has almost always been the question whether the government's position was substantially justified. In a few years when the government was experimenting with representation in social security disability cases, questions whether such proceedings were covered arose in a number of cases. Underdue v. Bowen, No. K-83-3885 (D. Md. 1987).

[30] But see text accompanying nn. 22-23, supra.

One of EAJA's purposes is to prevent individuals and small organizations from being deterred from litigating where the government's position is not substantially justified. If the assumption is that such deterrence arises from the high costs of litigation that accompany formal adjudication, such deterrence will not vary substantially depending on whether the adjudication is expressly governed by section 554, or whether similarly complex or formal procedures arise from some other source. The litigation costs to a private party are likely to be on approximately the same scale.[32] It seems of questionable fairness for a private party to be penalized simply because the procedures for a formal hearing derive from some other source, be it a statute other than the APA or be it regulations.[33] There is considerable appeal to the notion that the question of coverage should turn on substance--the fact that a party has endured the burden and expense of a formal hearing--rather than on technicalities.

Moreover, as noted above, the costs of EAJA have been much lower than expected.[34] While the reasons for this are not known, at least one factor may be that the "threat" of potential EAJA liability serves as a deterrent against government misfeasance. If that is the case, the benefits from EAJA's existence would spread as its coverage expanded.

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[31] E.g., Hodge v. U.S. Dep't of Justice, 929 F.2d 153, 159 (5th Cir. 1991); cf. St. Louis Fuel & Supply Co., Inc. v. FERC, 890 F.2d 446, 451 (D.C. Cir. 1989).

[32] See, e.g., St. Louis Fuel & Supply Co., Inc. v. FERC, 890 F.2d 446 (D.C. Cir. 1989). In that case, the procedural framework was virtually the same as that required by section 554, but it derived partly from the Dep't of Energy Organization Act, and partly from FERC regulations. The costs to the private party would not vary as a result of the source of the procedural framework.

[33] Of course, this unfairness would not rise to constitutional levels.

[34] See text accompanying nn. 22-23, 28. EAJA awards have also been significantly below projections in court proceedings. The Congressional Budget Office cost estimates for judicial awards ranged from $67.7 million in 1982 to $90 million in 1984. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S.C.C.A.N. 4984, 4988-90. For the years 1983-90, EAJA awards in judicial proceedings totalled approximately $16.7 million. Administrative Office of the United States Courts, Annual Report (1990) at 35; Administrative Office of the United States Courts, Annual Report (1988) at 101.

V. Considerations in Amending EAJA

In considering whether EAJA's coverage should be expanded past the confines of proceedings explicitly subject to section 554, a number of questions arise. How much should it be expanded? And, how should new lines be drawn?

Several alternatives are at least theoretically available. A proceeding required by statute to have the same parameters as those in sections 554 (and 556 and 557) could be made subject to EAJA. A proceeding required by regulation (or by a combination of statute and regulation) to have those same parameters could be covered. A proceeding that has "substantially" the same procedure parameters could be covered. Congress could decide on a case-by-case basis whether certain specific types of proceedings could be covered.[35]

A. Proceedings Statutorily Required to have the Same Procedures as Section 554

Certain types of proceedings, such as deportation cases, have statutorily-mandated proceedings that track section 554's requirements, but are not governed by that section. In these situations, the relevant statutes provide for hearings whose procedural parameters are in essence those required under section 554 (and 556 and 557). Given that Congress has determined that the adversarial hearing should have the same level of formality as those already covered by EAJA, it seems logical that the benefits of EAJA should also apply. The principal drawback of this approach is the need to determine in any particular case whether the procedures are in fact the same as those in section 554 proceedings. In some cases, this might be fairly straightforward. In others, it might be more difficult, depending on how Congress provided for the applicable hearing procedures.[36]

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[35] Congress has done this in certain situations. In 1985, Congress amended section 504(b)(1)(C) to cover certain disputes before boards of contract appeals. It amended that section again in 1986 to cover proceedings under the Program Fraud Civil Remedies Act, 31 U.S.C. §3801. Such proceedings arguably would have been covered without the specific amendment, since most hearings under that statute are subject to section 554. 38 U.S.C. §3803(g).

[36] See Haire v. U.S., 869 F.2d 531 (9th Cir. 1989). In this case, involving certain violations of the export control regulations, sections 556 and 557 expressly applied, and section 554 did not.

B. Proceedings Where Section 554 Procedures are at Least Partly Provided for by Agency Regulation.

In some situations, Congress provides for certain procedural protections, which the agency augments in a manner that conforms to section 554 hearing procedures. For example, the statute governing appeals of certain Department of Energy remedial orders to the Federal Energy Regulatory Commission provides for minimum procedural requirements that are less than section 554 requires. However, FERC has by regulation matched the section 554 requirements.[37] Again, from the point of view of the private party, the burden does not vary depending on the source of the procedural requirements. This might suggest that EAJA ought to apply even where the procedures do not derive from statutory sources.

Weighing against such applicability is the fact that the agency has voluntarily offered the private party the procedural protections of a formal hearing. It might be less inclined to do so if the price for offering such benefits would be to subject itself to liability under EAJA.[38] The issue of whether agencies should be encouraged to provide formal proceedings is beyond the scope of this paper. However, the fact that imposing EAJA liability may serve as a significant disincentive to agencies voluntarily providing additional procedural protection argues against recommending such a standard.

C. Proceedings that by Statute Use Formal Procedures that are not Exactly the Same as Section 554

Congress has in various situations provided for administrative hearing procedures that vary from section 554. These hearings may be more or less formal. The costs to a private party may also be more or less than the costs of proceedings currently covered. In fact, given the variation in levels of fee awards in administrative EAJA awards, it is difficult to draw any clear conclusions about the costs of administrative proceedings to private parties.[39] Although it is at least theoretically possible to develop standards on how close to section 554 other proceedings should have to be before the benefits of EAJA would apply, in practice those lines could be extremely difficult to draw. Would it be crucial, for example, that a proceeding did not require separation of functions? What about the right to be provided with a proposed or initial decision? Would it be determinative that the presiding officer were or were not an ALJ? These kinds of issues could substantially increase litigation over coverage of the Act.

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[37] See St. Louis Fuel and Supply Co., Inc. v. FERC, 890 F.2d 446, 449 (D.C. Cir 1989).

[38] Preamble to ACUS Model Rules, 46 Fed. Reg. 32900, 32901 (1981), supra n. 6.

[39] In FY 1990, the amount of EAJA fees requested in proceedings varied from a low of $1058 to a high of $925,441, with an average of $55,300. Awards varied from a low of $300 to a high of $475,700, with an average of $41,000. More than two-thirds of awards were less than $30,000. ACUS 1990 EAJA Report at App. III.

D. Specific Proceedings as Congress Determines

The final, and most workable alternative is to recommend to Congress that it consider on a case-by-case basis whether EAJA ought to apply to statutorily-created administrative proceedings. Congress could thus weigh for itself whether, for example, prevailing petitioners in deportation cases should, where the government's position was not substantially justified, be entitled to EAJA fees. Congress could also decide whether it wished to provide the protection of EAJA coverage in less formal proceedings where a particularly strong interest was at stake. For example, Congress might consider it important not to deter challenges to government conduct where personal safety (as in asylum cases) or continued livelihood (security clearance revocation cases)[40] were at stake, even though it might not want to provide extremely formal processes.

A potential problem with this type of approach is that it could lead to an uneven patchwork of proceedings that were covered, depending on whether Congress (or practically speaking, different committees of Congress) remembers to consider the issue in an particular context. On the other hand, this approach would certainly lead to the clearest lines of demarcation.

V. Conclusion

Although there are several alternatives, the most practical proposal appears to be to encourage Congress to carefully review the range of administrative hearing programs currently operating outside of section 554 of the APA, and to consider the applicability of EAJA to additional categories of proceedings on a case-by-case basis.

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[40] Hearings involving security clearance revocations are currently heard at the Directorate for Industrial Security Clearance Review (DISCR). Hearings are fairly formal but not presided over by ALJs.

Report for Recommendation 92-6

The Dormant Noise Control Act and Options to Abate Noise Pollution

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With a Technical Appendix on Noise and Its Effects

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Introduction

In early 1981, the Director of the Office of Noise Abatement and Control (ONAC) at the Environmental Protection Agency (EPA) was informed that the White House Office of Management and Budget (OMB) had decided to end funding of ONAC and that the matter was non-negotiable.[1] Congress' eventual acquiescence in OMB's action was, and remains, unique. Of the 28 environmental and health and safety statutes passed between 1958 and 1980,[2] the Noise Control Act of 1972 (NCA)[3] stands alone in being stripped of budgetary support.

Since Congress did not repeal the NCA when it eliminated ONAC's funding, EPA remains legally responsible for enforcing the regulations it issued under the Act, but without any budget support legislated for that purpose. Moreover, although some of the regulations are now out of date, and others may be inadequate, EPA's lack of budgetary support effectively precludes their amendment. Since the NCA preempts local and state governments from regulating noise sources in many situations, these levels of government may not be able to step into the void created by Congress' decision not to fund EPA.

This report considers the future of noise abatement in the United States and what role EPA should play in that function. Part I describes the history of noise abatement in the United States before ONAC was created, during its tenure, and after its abolition. Part II evaluates the role of local and state governments in noise reduction and EPA's relationship to such efforts. Part III assesses the role of the federal government and EPA in noise reduction.

The report concludes that it would be unfortunate for Congress to maintain the status quo where EPA has ongoing legal duties, but it has no funding to carry them out. Although Congress could eliminate the federal government's responsibilities for noise abatement, the NCA, with modifications, should remain in force. This does not mean, however, that EPA should merely pick up where it left off 10 years ago. Instead of relying primarily on emissions controls as it did previously, EPA should emphasize abatement approaches that rely on local and state activity, on market incentives, and on coordination with other agencies, private standard-setting groups, and regulatory agencies in other countries.

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[1] Interview with Charles Elkins, Assistant to the General Counsel, EPA, in Washington, DC (Nov. 19, 1990).

[2] *See* C. Sunstein, After the Rights Revolution: Reconstructing the Regulatory State (1990) (listing the statutes).

[3] Noise Pollution and Abatement Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234 (1972) (codified as amended at 42 U.S.C. §§4901-4918 (1988).

I. Noise Abatement in the United States

Noise abatement has come almost full circle in the United States. Prior to the 1970s, there was almost no governmental activity addressed to noise pollution. During the 1970s, all three levels of government were active in abating noise. Since 1981, when ONAC lost its funding, the level of activity at all three levels has been significantly reduced, and although it is greater than prior to the 1970s, it is not significantly greater except in a few areas. This section describes the roller coaster history of noise abatement in this country and its likely effect on the level of noise at this time. The analysis considers noise abatement prior to ONAC, during ONAC, and after ONAC.

A. Noise Abatement Prior To ONAC

In the 1960s, noise pollution was a distant cousin in the family of environmental issues and, as this history will relate, it has remained outside the mainstream of the environmental movement ever since. A massive public opinion survey taken in the early 1970s revealed that the public ranked noise pollution as a serious problem,[4] but noise control advocates were unable to develop the same type of organized constituency that developed to support clean air and water.[5] One reason was that although "air and water pollution was shown actually to kill people," the supporters of noise control could not demonstrate a "direct cause and effect relationship" between excessive noise and death.[6] Advocates also lacked any dramatic illustrations of noise pollution similar to the Cuyahoga river catching on fire, nor did they have someone like Rachael Carson or Barry Commoner to popularize their cause. Because noise pollution is produced by hundreds of types of sources, noise control proponents also found it more difficult to arouse public indignation against convenient corporate targets in the way that other environmentalists attacked the automobile industry or chemical manufacturers.[7] Finally, advocates had trouble generating widespread support because of the incidence of noise pollution. Whereas air and water pollution normally affect large areas, only a small proportion of the people in a city or state may be burdened by particular sources of noise, and that burden may have been imposed on them by the other residents who wished to obtain the benefit of a highway, airport, or industry.[8]

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[4] In a 1973 national survey of housing and neighborhood conditions by the Department of Housing and Urban Development, street noise was cited by 34 percent of the 60,000 respondents as a "condition" in the neighborhood, while 60 percent of those reporting the condition felt it was "disturbing, harmful, or dangerous," and 18 percent felt that it was so "objectionable" that they would "like to move." Address By Kenneth Eldred, Noise At The Year 2000, Fifth International Congress On Noise As An International Problem, Sweden (1988), at 9.

[5] *See* R. Paehlke, Environmentalism and the Future of Progressive Politics (1989) (describing origins of the environmental movement); C. Bosso, Pesticides & Politics: The live Cycle of a Public Issue (1987) (same).

[6] Hilderbrand, *Noise Pollution: An Introduction To The Problem and An Outline For Future Legal Research*, 70 COL. L. REV. 652, 655 (1970).

Despite these handicaps, noise control advocates made some headway starting in the late 1960s. Prior to that time, local noise regulation was based on legislation or ordinances that prohibited "excessive or unusual" noise, which were difficult to enforce because of their subjective character.[9] Once portable noise measuring equipment became available,[10] local and state governments began to promulgate objective emissions limitations, stated as a maximum number of decibels (dB).[11] At about the same time, Congress authorized the Federal Aviation Administration (FAA) to regulate aircraft noise emissions,[12] enacted the National Environmental Policy Act (NEPA),[13] which required agencies to assess noise impacts as part of environmental impact statements, and directed EPA to establish ONAC and to have it prepare recommendations to Congress within 1 year for further legislation.[14] Congress passed the NCA after receiving that report.[15]

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[7] *See* Wilson, "THE POLITICS OF REGULATION," in The Politics of Regulation 370 (J. Wilson ed. 1980) (environmental movement succeeded by capitalizing on a crisis, putting opponents on defensive by accusing them of bad acts, and by associating legislation with widely held values like clean air).

[8] Letter from Noral Stewart, Stewart Acoustical Consultants, to David Pritzker, Administrative Conference of the United States (ACUS) (Mar. 12, 1991), at 3. Thus, large metropolitan areas are more likely to have noise abatement programs because noise impacts a majority of the population. In other areas where the impact is on a minority of the residents, they find it difficult to get help from local governments which are afraid of being disadvantaged in the competition for industry by creating regulations that other jurisdictions do not have. *Id.*

[9] Findley & Plager, *State Regulation of Nontransportation Noise: Law & Technology*, 48 S. CAL. L. REV. 209, 254 (1974).

[10] Telephone Interview with Frank Gomez, President, National Association of Noise Control Officials (NANCO) (Dec. 5, 1990).

[11] Findley & Plager, supra note 9, at 253. Noise legislation was passed in Illinois and New York in 1970, in Florida, New Jersey, and North Dakota in 1971, in Hawaii in 1972, and in California in 1973. *Id.*

[12] Pub. L. No. 90-411, 82 Stat. 395 (1968) (codified at 49 U.S.C. §§1431 (1988).

[13] Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§4321-4370 (1988)).

Congress acted despite the lack of significant organized public support for two reasons. First, the railroads, interstate motor carriers, and motor vehicle manufacturers supported the NCA because they were concerned about complying with conflicting state and local regulations.[16] Second, EPA told Congress that 34 million persons were exposed to nonoccupational noise capable of inducing hearing loss, 44 million persons had the utility of their dwellings impacted by transportation and aircraft noise, and 21 million persons had the same problem with construction noise.[17]

Congress intended the NCA to protect all Americans from "noise that jeopardizes their health or welfare."[18] It required EPA to regulate noise emissions from new products used in interstate commerce,[19] coordinate the noise abatement efforts of other agencies,[20] and provide information to the public concerning the noise emission of products.[21] While federal action was "essential to deal with major noise sources in commerce control of which require national uniformity of treatment," Congress intended that the state and cities retain the "primary responsibility for control of noise."[22] Congress therefore preempted state and political subdivisions from imposing their own emission standards on new products that were already regulated by EPA,[23] but it did not preempt them from controlling noise by the use of "licensing, regulation, or restriction of the use, operation, or movement of any product or combination of products."[24]

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[14] Noise Pollution and Abatement Act of 1970, Pub. L. No. 91-604, 84 Stat. 2709 (1970) (codified as amended at 42 U.S.C. §§7641-7692 (1988).

[15] EPA, Report to the President and Congress on Noise (1971).

[16] Interview with Kenneth Feith, Senior Scientist/Advisor, Office of Air and Radiation EPA, in Washington, DC (Nov. 19, 1990) (former ONAC official); Interview with Marshall Miller, in Washington, DC (Nov. 20, 1990) (former EPA General Counsel); Telephone interview with Ralph Hillquist (Jan. 7, 1991) (former General Motors employee).

[17] Senate Committe on Public Works, Environmental Noise Control Act of 1972, S. REP. NO. 1160, 92nd Congress, 2d Sess. 2 (1972); *reprinted in* 1972 U.S. Code Cong. & Ad. News 4655-4698 [hereinafter "Senate Report"]; House Commt. on Interstate and Foreign Commerce, Environmental Noise Control Act of 1972, H. REP. NO. 842, 92nd Congress, 2d Sess. 6 (1972) [hereinafter "House Report"].

[18] 42 U.S.C. §4901(b) (1988).

[19] *Id.* §4905.

[20] *Id.* §4903(c).

[21] *Id.* §4907.

[22] *Id.* §4901(3).

[23] *Id.* §4905(e)(1). States and local governments, however, have the option of enforcing the EPA regulations by adopting "identical" limitations as their own laws or ordinances. *Id.*

This division of authority affected the development of noise abatement in two ways. First, unlike other environmental statutes, such as the Clean Air Act,[25] EPA was given no responsibility to set abatement goals for the states. As a result, ONAC tended to think of its mission as exclusively federal. As the next section will develop, this orientation inhibited state and local efforts at noise abatement during the 1970s. In addition, because EPA did not set mandatory goals for the reduction of noise, states and local subdivisions have no legal responsibility to addresses noise pollution. Political support for noise abatement was also affected. The ambient air pollution limitations set by EPA are a continual public reminder of the harms of air pollution and of the nation's progress in reducing those harms. The lack of any similar goals concerning noise pollution contributes to its low political visibility.

Second, unlike for other environmental statutes, Congress chose not to support state and local abatement efforts with federal program grants for personnel and equipment, although EPA had asked for such support.[26] A

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[24] *Id.* §4905(2). State and localities, however, were completely preempted from regulating the same railroad or motor carrier noise emissions regulated by EPA unless it granted a "special local circumstances" exemption. *Id.* §§4916(c) (railroads), 4917(c) (motor carriers).

[25] Under the Clean Air Act, EPA sets national ambient standards which the states must meet by controlling sources of air pollution (other than mobile sources). 42 U.S.C. §7409-10 (1988). Congress rejected a similar scheme for noise because it "would, in effect, put the federal government in the position of establishing land use zoning requirements on the basis of noise . . . [which] is a function . . . more properly that of the States and their political subdivisions . . . ." House Report, supra note 17, at 9. This reason, however, fails to distinguish air pollution from noise pollution if both are considered to be health measures. The harms caused by noise pollution, like those caused by air pollution, do not change by geographical area. In this circumstance, there is no justification for permitting one geographical area to permit more harm to its citizens than another area. The previous reason, however, is more defensible to the extent that noise abatement is a response to aesthetic or nonhealth concerns, because it permits local aesthetic tastes to dictate the amount of regulation. At the time it passed the Act, however, Congress considered noise to be at least, in part, a health problem. *See* supra notes 16 & 17 and accompanying text.

The politics of the Noise Act may offer a more persuasive explanation of why Congress did not model the Noise Act on the Clean Air Act. The strongest support for the Act were industries that desired federal preemption, supra note 16 & accompanying text, and they had no reason to support legislation that would have forced the states and local governments to regulate nonmobile sources of noise as well. Moreover, some environmentalists, such as Senator Muskie, were afraid that EPA would use preemption to enact weaker abatement requirements than states and local governments. Senate Report, supra note 17, 21-22. This worry may have split support for a more comprehensive effort.

[26] EPA had asked Congress to establish a categorical grants program similar to that established under the Federal Water Pollution Act, which provides grants to localities for

House committee responded that while technical assistance was "desirable," it was neither "necessary or appropriate" to provide categorical program assistance to the states.[27]

B. Noise Abatement During ONAC

The Noise Act assigns EPA the responsibility to promulgate emissions standards, require product labeling, facilitate the development of low emission products, coordinate federal noise reduction programs, assist local and state abatement efforts, and promote noise education and research. Implementation of governmental programs is difficult[28] and measured against this reality, ONAC accomplished a great deal. Yet, like other health and safety programs,[29] ONAC had both successes and failures. Some of the failures were self-induced, but others can be attributed to forces beyond ONAC's control. The following section describes EPA's record in meeting its statutory duties.

1. Regulation of Noise Emissions

The NCA authorizes EPA to regulate noise emissions emitted from products distributed in interstate commerce[30] and from interstate railroads[31] and motor carriers.[32] ONAC promulgated several regulations and identified additional sources of noise that it intended to regulate. Although its regulatory output was not high, ONAC's output was reasonable in light of the constraints under which it operated.

Congress mandated a four-step regulatory process for regulating product noise. The first three steps consist of reports that EPA was required to write within short time deadlines.[33] Within 9 months EPA assessed the effects of noise on the public health and welfare,[34] within 12 months it evaluated what

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equipment purchases and personnel. House Report, supra 17, at 24; *see* H.R. 6002, 92nd Cong., 2d Sess. §102 (1972).

[27] House Report, supra note 17, at 24.

[28] *See* J. Wilson, Bureaucracy: What Agencies Do and Why They (1990).

[29] *See* Shapiro & McGarity, *Reorienting OSHA: Regulatory Alternatives & Legislative Reform*, 6 YALE J. REG. 1, 3 (1989) (health and safety agencies have had limited productivity).

[30] 42 U.S.C. §4905.

[31] *Id.* §4916.

[32] *Id.* §4917.

[33] 42 U.S.C. §§4904(a)-(b).

[34] U.S. Environmental Protection Agency, Public Health and Welfare Criteria for Noise (1973).

levels of abatement were "requisite" to protect public health and welfare,[35] and within 18 months it identified "major" noise sources and "techniques for reducing noise from those sources.[36] The second report, known as the "Levels Document," and called a "landmark treatise" by one commentator,[37] concluded that an adequate margin of safety required persons to be exposed to no more than a yearly average equivalent sound level of 75 dB for an 8-hour day to prevent hearing loss, and an average equivalent sound level of 55 dB to protect against activity interference.[38]

As a fourth step, Congress required EPA to propose initial regulations for each major noise source for which an emission standard was "feasible" within 18 months of its identification and to promulgate a final regulation within 6 months after the proposed regulation.[39] ONAC during its tenure identified 10 products for regulation, promulgated four regulations (air compressors, motorcycles, trucks, and truck mounted waste compactors) and proposed two regulations (buses and wheel and crawler tractors).[40] No emissions standards were proposed for four of the products identified as noise sources (pavement breakers, power lawn mowers, rock drills, and truck mounted refrigeration units).[41] For both the proposed and final rules, ONAC habitually missed the statutory deadlines, often by several years.[42]

EPA had similar delays in regulating motor carrier and railroad noise emissions. Congress required EPA to propose emission standards for these noise sources within 9 months and final regulations 6 weeks later.[43] ONAC promulgated one motor carrier standard, which was 1 year late.[44] EPA proposed seven railroad emission standards and promulgated five of them.[45] The American Associations of Railroads (AAR) sued EPA after it was 2 years late promulgating the first standard.[46] Although the D.C. Circuit ordered EPA to promulgate a final regulation for other areas of railroad operations by August 1978,[47] EPA missed the court's deadline by over 2 years.[48]

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[35] EPA, Information on Levels of Environmental Noise Requisite to Protect Public Health and Welfare with an Adequate Margin of Safety (1974) [hereinafter cited as "Levels Document"].

[36] EPA, Identification of Products as Major Sources of Noise, 39 Fed. Reg. 22297 (1974).

[37] Suter, *Noise Wars*, TECHNOLOGY REVIEW, Nov./Dec., 1989, at 47.

[38] Levels Document, supra note 35, at 4. EPA indicated that for the most sensitive part of the population the 75-dB level would produce no more than 5 dB noise-induced permanent threshold shift at 4,000 Hz, which is the frequency at which the ear is most easily damaged. *Id*. at 20. EPA also found that an average ambient noise level of 55 dB or more caused interference with communication and annoyance out of doors, *id*. at 3, and an average level of 45 dB had the same effects indoors. *Id*.

[39] 42 U.S.C. §4905(a). The deadlines, however, only applied if the major noise sources were in the categories of construction or transportation equipment, motors or engines, or electrical or electronic equipment. *Id*. §§4905(a)-(b). In promulgating emissions standards, EPA had to consider the harm a source posed, the level of reduction in that harm achievable through the application of best available technology, and the cost of compliance. *Id*. §4905(c)(1).

[40] Appendix I *infra*.

[41] *Id*.

[42] *Id*.

The statutory deadlines were unrealistic for several reasons.[49] The principle reason was that ONAC faced significant technical problems in developing a regulatory program.[50] ONAC's efforts were also hampered by insufficient funding and staffing in its early and later years,[51] and by a lack of cooperation from EPA administrators, who were sometimes slow to sign off on clearances needed by the program.[52] For example, ONAC's standard for interstate buses sat in Douglas Costle's office, EPA's administrator during the Carter administration, for over 1 year and eventually became a victim of Costle's failure to sign off on any agency regulations during his waning days as administrator. After the Reagan administration took office, the bus standard went unattended by the EPA Administrator for another year.[53] In general, EPA managers did not disregard the noise program, and some were supportive of it, but several appeared to regard noise abatement as less important than the agency's other missions.[54] This last sentiment was also present elsewhere in the agency. For example, one of ONAC's attorneys reports that other EPA attorneys held him in low regard because he was "stuck" representing the noise program.[55]

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[43] 42 U.S.C. §§4916(a)(1)-(2) (railroads), 4917(a)(1)(2) (motor carriers). In both cases, EPA was to choose limits that reflected application of the best available technology, taking into account the cost of compliance. *Id.* §§4916(a)(1), 4917(a)(1).

[44] Appendix II *infra*. EPA also proposed, but did not promulgate a standard that would have permitted local regulation of truck yards. *Id.*

[45] Standards were promulgated for locomotives and railcars, switcher locomotives, retarders, locomotive load cell test stands, and car coupling. Appendix II *infra*. Standards were proposed, but not promulgated, for permitting local regulation of rail yards and for railroad property emissions restrictions. *Id.*

[46] Appendix II *infra*.

[47] Association of American Railroads v. Costle, 562 F.2d 1310 (D.C. Cir. 1977).

[48] Appendix II *infra*.

[49] *See* Shapiro & Glicksman, *Congress, the Supreme Court, and the Quiet Revolution In Administrative Law*, 1988 Duke L. J. 819, 833 (discussing why agencies have difficulty meeting short deadlines).

[50] General Accounting Office, Noise Pollution--Federal Program to Control has been Slow and Ineffective 43 (1977) [cited hereinafter as "Noise Pollution"]. Regulation of railroad emissions was hampered, for example, by the complexity of the rail industry and by the fact that no comprehensive studies of railroad noise existed. Wood, *Traffic Noise Regulation: A Comparative Case Study*, 1979 B.Y.U.L. Rev. 461, 495 n.8 (1979). Other significant problems for railroad and other regulations included identification of best available technology and cost of compliance, defining the scope of each standard, and establishing rules for testing the level of noise emissions. *See id.* at 510-561. ONAC was forced to rely on contractors to obtain the technical information required for regulation and this was another source of delay. The contracting process at EPA was slow and it sometimes took up to 1 year to hire a contractor. Interview with Kenneth Feith, in Washington, DC (June 20, 1991).

[51] Letter from Alvin Meyer, Jr. (initial ONAC director), to David Pritzker, ACUS (Mar. 26, 1991), at 2; Feith interview, supra note 50. In EPA's 1975 budget request, the agency's administrator indicated that "we are holding the Noise Program to a low level of growth and consciously stretching out the full implementation of the 1972 Act." Letter from Russell E. Train, Administrator, EPA, to Ray Ash, Director, OMB, *reprinted in Noise Control Act Extension, Hearings on H.R. 5272 Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. 43 (1975) [cited

2. Product Labeling

EPA's second function under the NCA is to mandate labeling for products that emit or reduce noise,[56] but the only labeling regulation ONAC promulgated was for hearing protection devices.[57] The primary reason was that EPA's agenda in noise regulation was dominated by the restrictive legislative deadlines established by Congress for the promulgating of noise regulations.[58] In addition, a person outside the agency believes that the

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hereinafter as *Extension Hearings*"]. Funding for standard setting improved during the middle of the 1970s, but at the end of the decade funding was decreased to support technical problems for state and local governments. Feith interview, *supra*.

[52] Feith interview, supra note 50.

[53] Interview with Ken Feith, EPA, in Washington, DC (Feb. 28, 1991). The standard was subsequently withdrawn after ONAC lost its funding. Appendix I *infra*.

[54] Feith interview; Telephone interview with Fred Mintz, Office of Federal Activities, EPA (Jan. 14, 1991).

[55] Interview with Jeff Cerrar, in Washington, DC (Nov. 19, 1990).

[56] 42 U.S.C. §§4907(a)-(b). States and local governments can establish their own labeling requirements only to the extent they do not conflict with EPA's regulations. *Id*. §4907(c).

[57] 40 CFR §211 (1990). ONAC invited comments on what criteria should be used to select noise emitting products for a labeling requirement in 1974, 39 Fed. Reg. 42,380 (1974), proposed criteria in June 1977, 42 Fed. Reg. 31,722 (1977), and promulgated criteria in 1979. 44 Fed. Reg. 56210 (1979). At that time it was disbanded, however, ONAC had not yet chosen any products to be labeled although it said it expected to require labels for vacuum cleaners, air conditioners, shop tools, dishwashers, and lawn mowers. Washington Post, June 24, 1977, at E-10, col. 3.

[58] *See supra* note 39 accompanying text.

leadership in the labeling area was less experienced than in other areas of ONAC.[59]

3. Low-Noise-Emission Products

The NCA also ordered government agencies to purchase "low-noise-emission products" (LNEP), defined as products that emit "significantly" less noise than permitted by an applicable emissions standard.[60] Although ONAC took the preliminary steps necessary to effectuate this aspect of the NCA,[61] the office could not do more because the statute authorized EPA to define an LNEP only after it had promulgated an emissions standard for a product. Since at the time ONAC was abolished, it had promulgated emission limits for only four products,[62] little progress was made in stimulating LNEP purchases by the federal government. ONAC, however, was more active in encouraging states and local governments to purchase quieter products through its "Buy-Quiet" program, described in a later section.[63]

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[59] Telephone interview with Ken Eldred, Standards Director, Acoustical Society of America (Dec. 5, 1990).

[60] 42 U.S.C. §§4914(3), 4915(c). An agency must give preference to any LNEP that the General Services Administration has established does not cost more than 25% more than the least cost substitute for it, *id.* §4915(c), that does not require extensive maintenance to retain its low-noise qualities, *id.* §4915(d), and that does not involve operating costs significantly in excess of substitute products. *Id.*

[61] The act created a two-step certification process. Within 90 days of receiving an application for certification, EPA must determine whether a product qualifies as a LNEP, and, within 180 days later, it must decide whether the product is a "suitable" substitute for products currently being used by the federal government. *Id.* §4914(5)(F). Although ONAC promulgated procedures for administering the LNEP program in February 1974, 39 Fed. Reg. 6670, 6670 (1971) (codified at 40 C.F.R. §203.4(a)(1) (1978)), it did not quantify what level of reduction in noise would qualify a product as a LNEP or what criteria it would use to determine whether a product was a "suitable substitute." *Id.* at 6670. In May 1977, EPA proposed to define a LNEP as any product that emitted 5dB(A) less than the emissions limit EPA had set for that product. 42 Fed. Reg. 27,442 (1977). EPA's plan was to establish a LNEP level for each product at the time it promulgated an emissions standard for that product. *Id.* at 27,443. Since, however, it had already promulgated a standard for medium and heavy trucks, EPA proposed a LNEP level for these products at this time. *Id.* ONAC did establish an LNEP definition as part of its garbage truck and motorcycle standards. 40 C.F.R. §§205.152(c)(3), Feith Interview, supra note 50.

[62] Appendix I *infra*.

[63] *See infra* note 96 & accompanying text (discussing the "buy-quiet" program).

4. Coordination of Noise Reduction Activities

EPA also had the responsibility to coordinate the programs of other federal agencies relating to noise research and noise control.[64] ONAC engaged in a wide variety of efforts pursuant to this responsibility, and while some of its actions have been criticized, its efforts in this area were substantial.

ONAC engaged in various types of activities that related to the noise programs of other federal agencies. It criticized the Occupational Safety and Health Administration's (OSHA) proposed noise protection rule,[65] chaired the interagency task force responsible for implementing President Carter's "Urban Noise Initiative,"[66] and published reports describing federal research and other actions concerning noise.[67] One of the most important of these established guidelines for considering noise in land use planning and control.[68] Prior to some of this activity, the General Accounting Office (GAO) gave EPA generally low marks for its interagency coordination efforts.[69]

ONAC also engaged in coordination efforts addressed to private industry and international regulators. Towards the end of its tenure, ONAC worked with professional groups and regulated industries concerning development of consensus standards that both the private sector and the government could use.[70] ONAC personnel also served as part of the United States representation at international meetings concerning noise abatement.[71] ONAC also worked on harmonizing domestic and international regulations to reduce economic dislocations for United States firms operating here and abroad,[72] including "extensive coordination" with the EEC.[73]

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[64] 42 U.S.C. §4904(c). Congress gave EPA three duties. First, EPA was to "coordinate" all federal government programs relating to noise control and research. *Id.* §4904(c)(1). Agencies were required to furnish to EPA "such information as [it] may reasonably require" to carry out this function. *Id.* Second, Congress required federal agencies to "consult" with EPA concerning proposed noise regulations, and, if EPA requested, to specify reasons why a proposed regulation should not be revised. *Id.* §4903(c)(2). Finally, EPA was required to publish periodically a report on the status and progress of federal activities relating to noise. *Id.* §4904(c)(3).

[65] 5 ENV. REP. (BNA) 1884 (March 28, 1975).

[66] EPA, Noise Control Program: Progress to Date–1980, at 10 (1980) [cited hereinafter as Progress to Date]. Initiatives included soundproofing and weatherization of hospitals and schools, developing noise specifications and reduction incentives in government procurement as part of the "Buy-Quiet" program, writing guidelines for land planning to reduce noise, retrofitting buses to reduce noise, and supporting neighborhood self-help programs. *Id.* Other federal units involved included the Department of Commerce, Department of Defense, Department of Energy, Department of Housing and Urban Development, Department of Transportation, General Services Administration, National Bureau of Standards, and the Veterans Administration. *Id.*

[67] Progress to Date, supra 66, at 28.

[68] Federal Interagency Committee on Urban Noise, Guidelines For Considering Noise In Land Use Planning and Control (1980).

[69] Noise Pollution, supra note 50, at 31.

Despite these efforts, there are some complaints that ONEC could have done a better job of domestic and international coordination. For example, a scientist alleges that although there was "effective" communication between the technical community and ONAC during its early years, ONAC subsequently refused to participate in consensus development activities, and disregarded some or all of their consensus standards after they were devised.[74] An industry official alleges that at an ONAC-sponsored workshop, the regulated industries were unanimous about the need for ONAC to work more closely with them in developing goals and incentives for noise abatement, but that ONAC failed to include what industry said when it published a report of the proceedings.[75] And there are complaints that the behavior of an EPA official at an international meeting offended representatives from other countries and harmed EPA's credibility with them.[76]

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[70] For example, EPA sponsored a workshop at Florida Atlantic University, in Deerfield Beach, Florida, in December 1977, to identify standards needs and a plan for meeting them. Acoustical Society of America, Plan For The Development of Voluntary Standards On Environmental Sound In Response To Federal Agencies' Needs 1 (1978). Those attending included representatives from the Acoustical Society of America (ASA), the American National Standards Institute (ANSI), American Society for Testing and Materials, the Society of Automotive Engineers and several federal agencies, including in addition to EPA, the National Bureau of Standards, General Services Administration, Departments of Labor, Transportation, Health Education and Welfare, and Housing and Urban Development, and the Air Force and Navy. *Id.* at 2.

[71] Progress to Date, supra note 66, at 30-31.

[72] *E.g.*, EPA, A Comparison of Sound Power Levels from Portable Air Compressors Based Upon Test Methodologies Adopted By U.S. EPA and the CEC (1980).

[73] Feith interview, supra note 50.

[74] Telephone interview with Henning Von Gierke, Retired Director, Biodynamics & Biomechanics Division, Aerospace Medical Research Laboratory, United States Air Force (Apr. 19, 1991).

[75] Interview with James DuBois, Chairperson, Noise Task force, Edison Electric Institute, in Chapel Hill, NC (Apr. 18, 1991).

[76] The allegations are that the EPA official who headed the United States delegation to an OECD meeting reportedly made a "fool" of the entire delegation, Von Gierke interview, supra note 74, by the person's arrogant conduct. Eldred interview, supra note 59. According to these allegations, the United States not only lost the opportunity to influence the automobile noise emissions standards being discussed at the meeting, Von Geirke interview, supra note 74, but the atmosphere with European agencies was poisoned for a long time afterward. Eldred interview,

An EPA official notes that such complaints are common from persons in regulated industries and others who are unhappy when an agency does not accept their recommendations. He also disputes the characterization of what happened at the European meeting and denies that EPA has been disabled from effectively representing the United States. He notes that EPA continues to serve as the representative of the State Department at international conferences and receives invitations to contribute to such conferences in Asia as well as Europe.[77]

EPA's other efforts at coordination concerned the FAA's regulation of airport noise.[78] From December 1974 to October 1976, EPA submitted 11 proposals to FAA concerning aircraft noise.[79] Although the FAA did not accept most of these recommendations,[80] this result may not be a fair measure of their impact. By drawing public attention to the adequacy of FAA regulation of aircraft and airport noise, EPA undoubtedly influenced how the FAA proceeded. Moreover, FAA regulation was based on the scientific and technical work done by the EPA concerning the impact of aircraft noise.[81]

5. Assistance of State and Local Noise Control

Prior to 1978, EPA provided only limited support to state and local noise control efforts,[82] primarily because the NCA assigned the agency only limited responsibilities concerning nonfederal noise abatement.[83] In 1978, after congressional oversight hearings revealed that EPA's original mandate was

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supra note 59. A member of that delegation regards this result as "very, very deplorable" because the Europeans had adopted the American technical work on noise, and EPA therefore missed an opportunity to cement close relations with the EEC regulators. Von Gierke interview, supra note 74.

[77] Feith interview, supra note 50.

[78] Congress authorized EPA to propose noise regulations to the Federal Aviation Administration (FAA), which is responsible for regulating aircraft and airport noise, and required the FAA, after holding a public hearing, to adopt EPA's recommendations in whole or in part, or explain its reasons for not doing so. 49 U.S.C. §1431 (c)(1) (1976). If EPA believes that the FAA's action does not protect the public, it may request the FAA to reconsider its conclusions and to report to EPA concerning why its original recommendations were not adopted. *Id.*

[79] Transportation noise, *infra* note 130, at 27.

[80] *Id.* at 27 (FAA accepted one of EPA's 11 proposals and parts of two others).

[81] *See infra* note 363 & accompanying text.

[82] Noise Pollution, supra note 50, 19.

[83] EPA was authorized to advise state and local governments how to train personnel and select enforcement equipment and to prepare model state or local legislation. 42 U.S.C. §4913(2) (1976).

inadequate to foster state and local initiatives,[84] Congress passed the Quiet Communities Act,[85] which authorized ONAC to create a grants program and offer technical assistance to improve state and local noise abatement.[86]

After receiving this new authority, ONAC embarked on an ambitious and innovative program of supporting local and state governments, which for the most part was well regarded. ONAC offered a limited amount of direct financial assistance to a small number of states and cites,[87] but most of its efforts consisted of technical support such as 10 regional technical centers,[88] the ECHO (Each Community Helping Others) program,[89] and over 100 training programs attended by 4,000 noise officials.[90] ONAC also wrote and distributed a model state and local noise ordinance. The former was incorporated by 20 states,[91] while the latter was distributed to over 1,200 communities.[92] The model code has received compliments[93] and criticism for being too detailed, impractical, and noncommittal.[94] Concerning these complaints, an EPA official responds that ONAC prepared a 300-page workbook to explain the model ordinance and how it could be tailored to suit the needs of particular cities.[95] Finally, ONAC established a "buy-quiet" program that offered communities model contract specifications for the purchase of low-noise emission products.[96]

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[84] *Noise Control Act Oversight: Hearings before the Subcom. on Resource Protection of the Senate Com. on Environment and Public Works*, 95th Cong., 2d Sess. (1978) [cited hereinafter as *Oversight Hearings*]; *see* Senate Comm. on Environment and Public Works, Quiet Communities Act of 1978, S. Rep. No 95-875, 95th Congress, 2d Sess. (1978).

[85] Pub. L. No. 95-609, 92 Stat. 3079 (1978) (codified at 42 U.S.C. §4913).

[86] 42 U.S.C. §4913. EPA was authorized to give grants for surveying the extent of local noise problems, planning and developing noise control capacity, developing abatement plans around major transportation facilities, and evaluating techniques for controlling noise. *Id.* §4913(c)(1). EPA was also required to develop a program to assess the extent of Noise Pollution and abatement, to establish regional technical assistance centers, and to provide direct technical assistance. *Id.* §§4913(d)-(f).

[87] During 1979, for example, grants were made to 15 states, Progress to Date, supra note 66, at 1, of between $31,000 and $65,000. Interview with Casey Caccavari, EPA, in Washington, DC (Febr. 28, 1991). Twelve communities received grants for demonstration projects designed to test methods of noise abatement that could be used by other communities. Progress to Date, supra, at 1; *see generally* Center for Public Management, Final Report: Quiet Communities Program Demonstration (March 1982).

[88] Progress to Date, supra note 66, at 1.

[89] The ECHO program consisted of sending local noise abatement personnel to other cities to share their expertise and insights. *Id.* at 1, 3-4.

[90] ONAC held over 100 training sessions for approximately 4,000 state and local officials, served as a clearinghouse for noise control information, and engaged in other activities to support state and local training. *Id.* at 2; Suter, supra note 37, at 47. Other activities included developing training materials, including materials concerning noise measurement, and loaning state and local officials sound level meters and other equipment. Progress to Date, supra note 66, at 2.

[91] Progress to Date, supra note 66, at 2.

[92] Interview with Cassey Caccavari, EPA, in Washington, DC (Nov. 19, 1990).

[93] *E.g.*, Letter from Paul Schomer, Team Leader, Environmental Acoustics Team, Construction Engineering Research Laboratory, Corps of Engineers, Department of the Army, to

6. Noise Education and Research

The NCA also requires EPA to develop and disseminate information and educational materials concerning noise and to sponsor research concerning the effects of noise and the methods by which it can be abated.[97] ONAC was active in both areas, and once again its efforts were for the most part well received.

Beginning in 1976, ONAC's education efforts included establishing a National Information Center for Quiet, producing public service television announcements, designing and distributing teaching materials to school systems and unions,[98] and publishing 260 technical reports concerning noise abatement.[99] The reports have been praised as being useful to health and engineering professionals,[100] and criticized for being uneven in quality and

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David Pritzker, ACUS (Mar. 13, 1991), at 2 (among "most useful products"); Letter from David Lipscomb, Correct Service, Inc., to David Pritzker, ACUS (Mar. 19, 1991), at 2 ("has been used repeatedly").

[94] *E.g.*, Letter from Edwin Toothman, Director, Occupational Health, Health and Safety Services, Bethlehem Steel Corp., to David Pritzker, ACUS (Apr. 1, 1990) ("too detailed and somewhat impractical"); Letter from Fredrick Kessler, FMK Technology, Inc., to David Pritzker, ACUS (Mar. 19, 1991) ("technically flawed" but "did provide . . . starting point"); Letter from Edward DiPolvere, Chief, Office of Noise Control, New Jersey, to David Pritzker, ACUS (undated) (After "legal side of EPA . . . made final version so noncommittal that its value was diminished); Stewart Letter, supra note ("much more comprehensive that most communities ever wanted").

[95] Interview with Casey Caccavari, EPA, in Washington, DC (June 20, 1991).

[96] Progress to Date, supra note 66, at 10.

[97] 42 U.S.C. §§(a)-(b).

[98] Progress to Date, supra 66, at 7-8.

[99] Suter, supra note 37, at 47; *see* Environmental Protection Agency, Bibliography of Noise Publications 1972-1982 (undated) [cited hereinafter as Bibliography].

[100] *E.g.*, Comments On The EPA's Office of Noise Abatement and Control, Prepared By George Luz, Bio-Acoustics Division, Environmental Hygiene Agency, U.S. Army (Mar. 22, 1991) ("we continue to consult some of these reports even though they are 15 years old"), *in* Letter from Nelson Lewis, Acoustical Engineer, Bio-Acoustics Division, Environmental Hygiene Agency, U.S. Army, to Alice Suter (Mar. 22, 1991) [cited hereinafter as "Luz Comments"]; Letter from Patrick Carney, President, American Speech-Language Association, to David

technical content.[101] EPA also sponsored research projects to investigate potential health dangers posed by noise and techniques to abate noise more effectively.[102]

C. Noise Abatement After ONAC

EPA's noise abatement activities essentially stopped after ONAC lost its funding. State and local activities also declined. This section proposes an explanation for Congress' decision to eliminate ONAC's funding and describes the status of noise control efforts after its elimination.

1. ONAC's Loss of Funding

Although ONAC's efforts were more successful in some areas than others, it had a record of accomplishment after the first decade of the NCA. ONAC promulgated four product and six transportation noise standards, but it was unable to complete work on standards for six other major noise sources. Although it made little progress in implementing product labeling or the LNEP program, ONAC was quite active concerning coordination, research and education, and support of local and state efforts. While this is a mixed record, it can not be said that it justifies elimination of the program. As noted earlier, government is a difficult business and most other health and safety programs have similar mixed records.

Despite the acceptable nature of ONAC's performance, Congress eliminated funding for the program for three reasons. First, EPA told Congress that ONAC should be disbanded because an austere federal budget required that some current federal programs be eliminated, the benefits of noise control were highly localized, and noise control could be carried out by state and local governments without the presence of a federal program.[103] Why EPA's management acquiesced in OMB's decision is unknown, but the

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Pritzker, ACUS (Apr. 4, 1991), at 5 (EPA publications "still valuable in providing technical assistance on subject"); Letter from Rena Glaser, Past President, National Health Conservation Association (NHCA), to David Pritzker, ACUS (Mar. 29, 1991), at 1 ("did find publications to be extremely valuable"); Letter from Andrew Stewart, President, NHCA (Apr. 3, 1991), at 1 ("several publications of ONAC were extremely helpful and influential"); Kessler Letter, supra note 94, at 1 ("publications proved to be very valuable"); Lipscomb Letter, supra note 93, at 1 ("value and keep close at hand" some ONAC documents).

[101] *E.g.*, Schomer Letter, supra note 93, at 1 ("technical content was mixed and never of the highest level").

[102] Progress to Date, supra note 66, at 11-13.

[103] *Oversight Hearing*, supra note 84, at 59.

decision is consistent with the general deregulatory attitude of Ann Gorsuch and other persons appointed by the Reagan administration to run EPA.[104] It is known that EPA's managers rejected a compromise to fund ONAC at a greatly reduced level. After OMB's initial decision to end funding for ONAC, OMB officials agreed after meeting with lower level EPA officials to fund ONAC at the level of around $1 million to maintain the enforcement of existing regulations. But EPA's management rejected the compromise and decided to eliminate ONAC entirely.[105]

Second, ONAC lacked strong political allies. Those industries that originally supported the NCA in order to obtain federal preemption of conflicting local regulations had accomplished their goal. They told Congress that it could disband ONAC as long as it maintained their preemption.[106] Moreover, as noted earlier,[107] there has never been a well-organized constituency for noise control similar to interest groups supporting other types of environmental protection.[108]

Finally, ONAC might have survived if its critics had not had the garbage truck standard to kick around. In 1979, EPA promulgated a regulation that limited noise emissions from truck-mounted waste compactors.[109] Because the noise reduction was achieved primarily by requiring garbage trucks to run their engines more slowly when they compacted garbage, ONAC considered the standard to be a reasonable response to the problem of noise created when garbage is compacted.[110] Nevertheless, the standard was opposed not only by the regulated industry, which argued it was unnecessary,[111] but also by some local noise administrators,[112] and White House staff,[113] who agreed. ONAC fought back--contending that "if we had been talking about a chemical substance with similar effects, EPA would have regulated with more dispatch and vigor[114]--but it lost the battle when nationally syndicated columnist James Kilpatrick opined, "Metaphorically speaking, if you will forgive me, this is garbage."[115]

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[104] *See* J. Lash, A Season of Spoils: The Reagan Administration's Attack on the Environment 28 (1984).

[105] Feith interview, supra note 16.

[106] *Oversight Hearings*, supra note 84, at 2 (Testimony of William H. Dempsey, President, American Association of Railroads) (taking no position whether ONAC should be continued, but favoring federal preemption of state and local noise regulation); *id*. at 124 (Statement of Motor Vehicle Manufacturers Association of the U.S., Inc.) (same); Letter to Senator Slade Gorton from Bennett C. Whitlock, Jr., American Trucking Association, *reprinted in id*. at 128 (same). The railroads and motor carriers gained credibility for this position from the fact that EPA emission standards for these industries are enforced by the Department of Transportation (DOT), which was not put out of business. 42 U.S.C. §§4916(b), 4917(b). These industries, however, did receive some regulatory relief. *See infra* note Section IB3 & accompanying text (discussing weaknesses of railroad and motor carrier regulation).

[107] Supra note 5 & accompanying text.

[108] Ruben, *On Deaf Ears*, Environmental Action, Mar./Apr. 1991, at 17 ("Public apathy about noise made it all the easier for EPA's office to quickly fall under Reagan's budget axe, says [David] Hawkins of the Natural Resources Defense Council.").

[109] 44 Fed. Reg. 56524 (1979).

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[110] *Id.* at 56526-56527. The agency estimated that the standard would produce a 74 percent decrease in the magnitude of refuse vehicle noise by 1991 and that about 19.7 million persons in cities and densely populated suburbs would benefit. *Id.* at 56532. An EPA official admits, however, that the agency's original plan for testing garbage trucks would have been expensive for the industry, but he maintains that ONAC was working with the industry to solve that problem. Feith interview, supra note 16.

[111] *See e.g.*, *Oversight Hearings*, supra note 84, at 4-6 (Testimony of Richard L. Hanneman, Director, Government and Public Affairs, National Solid Waste Management Association). The industry objected to the standard because not all noise generated by refuse collection is made by the compactor mechanism (the standard did not regulate other parts of the vehicle such as brakes and tires), locally imposed curfews have effectively limited citizen complaints about garbage truck noise, the standard had the effect of preventing trucks from compacting when moving, which reduced their productivity, and EPA had only weak evidence of adverse health effects. *Id.* at 4-5. A former ONAC official denies that the standard would have prevented garbage trucks from compacting when moving. Telephone interview with Fred Mintz, EPA (June 19, 1991).

[112] Jesse Borthwick, the Executive Director of the National Association of Noise Control Office told Congress:

> The problem with refuse collection noise can best be dealt with through local in-use and administrative controls. Reducing compactor noise emission levels 5 or 6 dB will virtually have no effect on reducing the impact of refuse collection in a noise sensitive area during morning hours when background noise levels are low.

Reauthorization of the Noise Control Act of 1972 Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce, 97th Cong., 1st. Sess. 27 (1981) [cited hereinafter as ["*Reauthorization Hearing*"].

[113] The Regulatory Analysis Review Group, located in the Carter White House, received more letters from Congress concerning the standard than concerning any other issue in its first 3 years. Clark, *Regulating Garbage Truck Noise--A Quiet Debate Is Getting Louder*, National Journal, November 1, 1980, at 38. A Regulatory Analysis Review Group study initiated in response to these complaints concluded a national standard was inappropriate for noise generated by garbage pickups. *Id.* at 39. The study reasoned that garbage collection noise was primarily a local problem because the desired level of product noise regulation depends on the ability to regulate a truck's pattern of use which varies tremendously among communities. *Id.*

[114] *Id.*

[115] Kilpatrick continued, "Cost and benefits to one side, this petty, stupid, nit-picking regulation based almost entirely upon gauzy conjecture as to 'sleep and activity interference'--offers one more instance of bureaucracy gone berserk." Kilpatrick pointed to successful local

2. Revocation of Pending Standards

Once Congress accepted EPA's request that it stop funding ONAC, the agency had to decide what to do about products that had been identified as significant noise sources because the NCA obligated it to regulate any products so identified.[116] An EPA attorney warned that the agency could not merely withdraw the prior designations because "there is no evidence to suggest that the products in question no longer have the same effects on public health and welfare" recognized when the products were identified as requiring regulation.[117] EPA also rejected withdrawing the prior designations on the basis that state and local governments had shown that they were capable of regulating these products because this reason was outside its legal authority and possibly not true.[118] The agency finally decided to justify its actions on the basis that noise regulation should be temporarily abandoned because of reduced federal tax revenues. In December 1982, EPA withdrew the outstanding product identifications[119] and revoked the emissions standard for garbage trucks.[120] Although EPA was nervous about its deregulation rationale, there was no judicial review.

EPA's justification for its actions is dubious. While the courts will take agency resources into account in responding to citizen suits to enforce time deadlines for rulemaking, lack of resources is only relevant to the amount of additional time the court will give an agency to comply with a deadline--it does not excuse an agency from ever regulating.[121] It is difficult to believe that

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efforts to control garbage collection noise and decided, based on this case, that the entire NCA was superfluous. Kilpatrick, *This Noise Regulation Is Just Garbage*, *reprinted in Reauthorization Hearings*, *supra* note, at 63. Kilpatrick later endorsed the "Buy-Quiet" program as an appropriate governmental response to noise without acknowledging ONAC's role in establishing the program. Kilpatrick, *Reaction From Memphis To Noise Level Column*, *id*. at 62.

[116] Note 39 supra.

[117] Memorandum from Samuel Gutter, Attorney, Air, Noise, and Radiation Division, to Robert Perry, General Counsel, Dec. 1, 1981, at 1.

[118] Memorandum from Robert P. Perry, General Counsel, EPA, to Kathleen Bennett, Assistant Administrator for Air, Noise, and Radiation, Dec. 10, 1981, at 1. EPA's General Counsel warned, that there were "serious risks to this approach, in part, because it relies on factors that the Act does not explicitly permit the Administrator to consider in determining what constitutes a 'major' source of noise, and, in part, because the [justifications] might be difficult to document." *Id.* He might have added that the two justifications were also internally contradictory. If local and state governments established emission standards for the products identified by EPA as major noise sources, the affected manufacturers would likely need federal preemption to protect them from inconsistent and conflicting regulations.

[119] 47 Fed. Reg. 54108 (1982).

[120] 48 Fed. Reg. 32502 (1983).

[121] *See* Shapiro & Glicksman, supra note 49, at 832-33.

Congress intended that EPA could postpone indefinitely the deadlines specified in the NCA by the simple expedient of withdrawing prior designations because the agency did not consider noise pollution an important problem. After all, the reason that Congress established the deadlines in the first place was to force EPA to regulate in a timely manner.[122]

The Anti-Deficiency Act[123] prohibits government officials from making or authorizing an expenditure or obligation in excess of a congressional apportionment.[124] Although the act might be interpreted to prohibit EPA officials from spending money appropriated for other purposes on implementation of the NCA, EPA has apparently not accepted that interpretation and has continued to carry out certain activities related to the implementation of the NCA.[125] For example, in 1986, EPA amended its regulations regarding noise standards for trucks and motor carriers. EPA has continued its coordination and consultation activities with other federal agencies regarding noise and has continued enforcement activities, albeit at a limited level. EPA has continued to disseminate existing information and educational materials regarding noise control activities.

While EPA may not be prohibited as a legal matter from promulgating standards for the significant noise sources it previously identified, it is effectively prohibited from doing so by the lack of any budget for that purpose. To promulgate new standards, or even amend existing ones, EPA would have to divert agency personnel from other tasks, hire contractors, and absorb other expenses. There is no indication that EPA has sufficient budgetary flexibility to take this step.

3. Enforcement of Existing Regulations

Since revoking the pending standards, EPA's regulatory activity has been limited to enforcement of the existing standards, except for the amendment of two standards mentioned above. EPA's enforcement efforts have been hampered in two ways by the elimination of ONAC. First, the agency was forced to drop industry compliance reporting requirements for its product and labeling standards because it did not have any staff to implement them.[126] Lacking any compliance data, EPA can not say whether product manufacturers are abiding by its regulations.[127] Second, EPA has been slow to investigate and enforce existing regulations when violations have been found. For example, EPA has been investigating since 1987 approximately 18 hearing protection device labelers for a range of violations.[128] The investigation has been stalled because EPA has had to borrow staff from other responsibilities and because it has to develop procedures to assess civil penalties for violations of noise regulations.[129] The impact of EPA's limited capacity to enforce its standards is mitigated by the fact that the Department of Transportation (DOT) is responsible for enforcing the transportation noise standards promulgated by EPA. Unlike EPA, DOT has ongoing enforcement programs. Nevertheless, there may also be problems with DOT enforcement.

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[122] *See id.* at 830 (Congress intends statutory deadlines to speed agency rulemaking).

[123] 33 Stat. 1257 (1905) (codified as amended at 31 U.S.C. §1517 (1988).

[124] *See* National Association of Counties v. Baker, 842 F.2d 369 (D.C. Cir. 1988) (Secretary of Treasury may not disperse funds that were originally appropriated after Congress passed legislation withdrawing the appropriation).

[125] *See* Defendents' Reply in Support of Motion for Judgment on the Pleadings, Ross v. Reilly, W.D. Tenn., Civil Action No. 88-1103 (Sept. 29, 1989), Transportation Noise, *infra* note 138, at 17. If a court did not agree that EPA could expend funds to implement the NCA, it could still hold that until Congress repeals the NCA, EPA is legally obligated to enforce it and must seek funding for that purpose. *Cf.* Tennessee Valley Authority v. Hill, 437 U.S. 153 (1977) (appropriations decisions do not repeal substantive statutory requirements in absence of clear legislative intent that a repeal was intended). Such a decision would have the virtue of forcing Congress either to repeal the NCA or give EPA funds to enforce it.

The Federal Railroad Administration (FRA), located in DOT, is responsible for enforcing EPA's railroad noise standards. It has discontinued routine noise inspections because the rate of compliance has been "extremely" high,[130] but the General Accounting Office (GAO) found that high compliance rates may be explained, in part, by the FRA's practice of not citing any railroad that has made a good faith effort to correct a violation, even if the railroad is still in violation of the standard after the correction is made.[131] Moreover, an EPA official reports that he received a complaint from a person living near a railroad that the FRA could not do anything about loud, night-time noises because inspectors did not work at night.[132]

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[126] When existing regulations were originally be promulgated, EPA required companies to test a certain number of products at random to ensure that they were in compliance with emission standards and to report the results to EPA. *See* 41 Fed. Reg. 57709 (1982) (description of testing and reporting requirements). In December 1982, EPA revoked the reporting requirements because it lacked any staff to review industry compliance. 47 Fed. Reg. 57709 (1982).

[127] One EPA official believes industry compliance remains high where manufacturers retooled production processes to accommodate noise emission standards because of the considerable expense of changing manufacturing methods. Where manufacturers can save money by not complying, however, he has found less compliance. For example, EPA brought an enforcement action against manufacturers of portable air compressors just before ONAC was abolished. Feith interview, supra note .

[128] *Id.*

[129] *Id.*

[130] General Accounting Office, Transportation Noise: Federal Control and Abatement Responsibilities May Need to be Revised 53 (1989) [hereinafter cited as "Transportation Noise"].

[131] NRA takes the position that if a mechanical problem causing noise emissions in excess of a standard is fixed, and a train nevertheless exceeds the standard, there is no violation because the railroad made a good faith effort to comply. *Id.* at 53-54.

The Federal Highway Administration (FHWA), also in DOT, has likewise deemphasized enforcement of EPA's noise standards claiming high compliance rates and the burden of other inspection duties.[133] The GAO reports, however, that older trucks may be making excessive amounts of noise because of inadequate maintenance.[134] Moreover, a state noise control official reports that he was asked by local FHWA personnel not to refer any more noise complaints to them because they were under pressure from Washington to undertake different tasks.[135]

The extent of weaknesses in DOT enforcement, if any, is unclear. This does not mean, however, that the enforcement of transportation noise regulations has been unaffected by ONAC's loss of funding. As the next section discusses, although EPA's railroad and motor carrier standards may need to be updated to protect the public adequately, EPA lacks the resources to undertake this task. ONAC's loss of funding may have harmed the public in another manner. FHWA officials told GAO that source controls are "probably the most cost-effective" way to address traffic noise, but without new EPA regulations, DOT will continue to spend millions of dollars for the erection of noise barriers along federal highways.[136]

4. Update of Existing Regulations

ONAC's loss of funding has had another effect besides restricting EPA's enforcement capacity. Because of a lack of funding, EPA can not update existing regulations that have become out of date or that are inadequate. Its labeling, railroad, motor carrier, and product standards may all be out of date.

EPA's noise protection labeling standard has become highly misleading. Scientific studies have demonstrated that persons wearing earplugs receive only 8 to 56 percent of the protection indicated by the Noise Reduction Rating

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[132] Feith interview, supra note 16.

[133] Transportation Noise, supra note 130, at 63-64.

[134] *Id.* at 68. The American Trucking Association concedes that a few motor carriers may not be maintaining their trucks up to EPA standards, but if additional enforcement is needed, it should be done by state and local governments. *Id.* at 68-69. State and local governments, however, are preempted from enforcement activity unless they adopt EPA regulations as their own laws. Note supra 23 & accompanying text.

[135] Telephone interview with Ed DiPolvere, Director, New Jersey Office of Noise Control (Dec. 4, 1990).

[136] Transportation Noise, supra note 130, at 67. Persons interviewed by GAO, including the American Trucking Association, indicated that future reductions in vehicle noise could be achieved by redesign of tires. *Id.* at 69.

(NRR) required by EPA, and that persons wearing earmuffs receive only 35 to 67 percent of the protection indicated by the EPA rating.[137] Recognizing these discrepancies, OSHA was forced to instruct its inspectors to assume that workers receive 50 percent less noise attenuation than indicated by an NRR.[138] An irony is that EPA has floundered for several years trying to force hearing protection manufacturers to comply with the existing labeling requirements.[139]

EPA's railroad standards also need updating. The FRA is powerless to protect some persons from railroad noise because there is no standard prohibiting noise emissions of certain operations,[140] existing standards are effectively unenforceable,[141] or because railroads have been able to exploit a loophole. An example of the latter problem has occurred in Boston where the FRA has been unable to prevent commuter railroads from running extremely loud engines (87 to 90 dB) all night long to keep heaters running in commuter passenger cars.[142] Even where the regulations are applicable, they may be inadequate. An EPA official explains that when the standards were developed, ONAC took into account the economic difficulty of the industry, and now that the industry's situation has improved, the standards may need to be reexamined.[143] Even if the regulations are not inadequate, they are written in a manner that makes them more difficult to perform. A FRA official points out that his agency could be more effective if EPA rewrote its standards to take advantage of the new noise measurement equipment that is now on the market.[144]

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[137] Letter from Frank Wilcher, President, Industrial Safety Equipment Association, to Sidney Shapiro (April 1, 1991), at 2; NHCA Letter, supra note 100, at 2 ("NRR is a misleading and essentially useless number for estimating hearing protection effectiveness"); *see* Letter from Elliott Berger, Manager, Acoustical Engineering, Cabot Safety Corp., to David Pritzker, ACUS (April 1, 1991), at 3 (listing studies). The studies indicate that real world attenuation is in the range of 8 to 56% of the NRRs for earplugs and 35 to 67% for earmuffs. Wilcher Letter, supra, at 2. The discrepancies arise because the testing methods required by EPA do not accurately reflect the conditions under which hearing protection equipment is used. Berger Letter, supra, at 3.

The NRRs are inaccurate in two other ways. First, because the NRR gives a single value, consumers are encouraged to compare NRR values in making a purchase. The fact that small differences in NRR values are not statistically significant leads consumers to conclude, erroneously, that small differences in NRRs are important. EPA labeling requirements, however, do not reflect this imprecision. Wilcher Letter, supra, at 3. Second, the EPA-mandated labeling fails to warn consumers that they may receive less protection than the NRR indicates in certain types of workplace situations. *Id.*

[138] OSHA Instruction CPL 2-2.35A, Appendix A (Dec. 19, 1983), at A-1.

[139] *See* supra note 132 & accompanying text (describing EPA's enforcement difficulties).

[140] For example, although EPA has a standard for car coupling, which addresses the noise created when one car bangs into another, it does not have one for slack actions, or the noise created when a train is moved forward to tighten connections between the cars. Interview with Robert Greer, Industrial Hygienist, FRA, in Washington, DC (Febr. 27, 1991).

[141] In some locations, FRA inspectors can not find terrain that matches the conditions established in the regulations for testing noise emissions. *Id.*

[142] The railroads avoid the standard for switching engines, which would prohibit the emissions, by using other types of engines. The railroads are in compliance with the standard for these other engines, because there is a higher emissions limit. There is a higher emissions limit because EPA assumed these other engines would be used in the open country and not sitting in a rail yard. *Id.*

Similar problems have cropped up with the motor carrier regulations. For example, inspectors frequently can not perform stationary tests on heavily traveled highways because of high background noise levels, which make it difficult to obtain accurate readings of noise from individual trucks.[145] It is not clear whether EPA could create noise tests that are less time consuming and difficult to perform, but until it receives funding to implement the NCA, it is unable to seek such methods.[146]

Finally, EPA may be able to improve its product standards by switching to sound power as the metric to measure noise emissions. A scientist currently doing research in this field asserts that adoption of this method would improve the accuracy of the standards.[147] Use of this method would also make it possible to conform them to standards adopted by the European Economic

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[143] Transportation Noise, supra note 130, at 54.

[144] Greer interview, supra note 140.

[145] TRANSPORTATION NOISE, supra note 130, at 64. An EPA official responds that because DOT has three other methods to enforce the truck emissions standard, this problem is not disabling. Feith interview, *supra* note 50.

[146] *See* supra Section IC2.

[147] Letter from Robert Hickling, Associate Director for Applied Research, Research Professor of Engineering, National Center for Physical Acoustics, University of Mississippi, to David Pritzker ACUS (Mar. 18, 1991), at 2. Professor Hickling explains:

> It is now possible to conduct indoor tests to measure the sound power of manufactured items such as automobiles. Sound-power tests measure the total noise output of a source, instead of sampling it at a point in space. Manufacturers prefer indoor tests because they are not subject to variations in the weather. Indoor sound-power tests have less variability in test data, making it possible to study noise due to variability in manufacturing, and the underlying mechanisms of noise generation.

Id.

Community (EEC), which rely on sound power measurements.[148] But an EPA official responds that current procedures may be more costeffective.[149]

5. Coordination, Education, and Research

ONAC's loss of funding also ended all but three of its previous coordination, education, and research functions. For example, ONAC was prevented from distributing model building and mechanical codes for noise abatement that it had completed.[150] It was also prevented from distributing technical reports it had completed on grain dryers and minibikes,[151] and from completing a model land planning code for land development surrounding airports.[152] EPA's three remaining efforts involve commenting on Environmental Impact Statements (EISs), participating in an interagency committee, and answering telephone inquiries. While EPA is committed to these actions, its effectiveness is constrained by its lack of resources. EPA comments on proposed FAA regulations[153] and EISs, and claims some success in persuading the FAA to do a better job disclosing noise impacts.[154] An FAA official, however, disputes the usefulness of the EPA input.[155] Whether or not appreciated by the FAA, EPA's efforts in this area are constrained by the fact that one part-time employee is responsible for the EIS reviews and he also has other responsibilities.[156]

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[148] *See* Maling Letter, *infra* note 160, at 2 (product regulations do not have "lasting value" because EPA "never recognized sound power as a measure of noise emissions, and was unwilling to consider international efforts in specification of noise emission); *see infra* note 354 & accompanying text (discussing need for EPA to coordinate domestic and international regulation).

[149] Feith interview, supra note 50.

[150] Caccavari interview, supra note 92.

[151] Interview with Casey Caccavari, EPA, in Washington, DC (June 21, 1991).

[152] *Id.*

[153] Transportation Noise, supra note 130, at 33.

[154] Mintz interview, supra note 54. For example, EPA rated an EIS concerning expansion of air cargo activity at the Toledo airport as unacceptable because it did not adequately disclose how increased noise activity could cause sleep disturbances for persons in the area of the airport. *Id.* After EPA threatened to appeal the adequacy of the EIS to the Council on Environmental Quality, the FAA agreed to revise the document. *Id.*

[155] Interview with Jim Densmore, Director, Office of Environment and Energy, FAA, in Washington, DC (March 1, 1991). Densmore explains that EIS disclosures are based on measure of a day-night average noise level (DNL) and that EPA's objections concern intermittent noises that, when averaged with other noises, would not be reflected in the DNL. He notes that the DNL is widely used and that the FAA has never lost a court case concerning the adequacy of an EIS when it has relied on the DNL. *Id.* The FAA could, however, add a supplemental measure of noise to reflect intermittent noise in the interest of fuller disclosure. *See infra* note 366 & accompanying text.

EPA is also a member of the Federal Interagency Committee on Noise (FICON). Among its functions, the committee is charged with considering whether agencies like the FAA should change the methods by which they measure noise impacts for EIS purposes.[157] It is not clear whether EPA's participation in the committee is hampered by its lack of noise personnel, but it may be since there are only a few persons left at the agency with a technical background in noise.

EPA also continues to respond to requests for noise information, but the elimination of ONAC has left dissemination of noise information in disarray. One part-time employee is available to respond to requests for information, but he has no extra copies of the documents in his library.[158] While some ONAC reports are publicly available from the National Technology Information Service,[159] local noise control officials and noise control consultants maintain that key ONAC documents are unavailable.[160]

A related problem is that although EPA no longer has a noise office, persons subject to regulation and local regulators still require clarification from time to time. Assisting them has become an increasing problem because industry is selling new types of products that do not match up well with standards that were written 5 to 10 years ago. EPA is able to respond to these inquiries only because it still has a few people left over from the noise program. As these key people leave, however, the agency will lose what little noise expertise it has left.[161]

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[156] Mintz interview, supra note 54. One other agency employee, who has another full-time assignment, sometimes also assists in these reviews. Feith interview, supra note 16.

[157] Telephone interview with Fred Mintz, EPA (June 19, 1991); *see infra* note 366 & accompanying text (discussion of possible change in the way that FAA measures noise impacts).

[158] Mintz interview, supra note 54. The employee is forced to photocopy documents in order to distribute them, but because of budget constraints, this method of dissemination is limited. *Id.*

[159] *See* Bibliography, supra note 99.

[160] Letter from George Maling, Jr., Editor, NOISE/NEWS, to David Pritzker, ACUS (Mar. 30, 1990), at 2 ("At one time NBS (now NIST) had a list of EPA publications [but it] is no longer available."); Carney Letter, supra note 100, at 5 ("Since 1982, it has been difficult to track down many of the EPA publications and perhaps they are out of print."); Telephone interview with Clifford Bragdon, Professor of City Planning, Georgia Institute of Technology (Oct. 10, 1990); Gomez interview, supra note 10.

Some ONAC reports and documents were transferred to NANCO, an organization of local noise control officials. They are in the possession of one of its former officers who had to construct a shed in his backyard at his own expense to preserve them. DiPolvere interview, supra note 135; *see* Ruben, supra note 108, at 18 ("Today, the archival information of [ONAC] is stored in a shed in DiPolvere's backyard in Trenton."). But an EPA official claims that the documents transferred to NANCO were duplicates of ONAC files retained by the government or were files that the government was not required to retain. Feith interview, supra note 50.

ONAC's loss of funding has another effect. Some of the available ONAC technical information is out of date. For example, ONAC's widely distributed model code is dated because although there is a new generation of noise monitoring equipment which is less expensive and more accurate, the code is not written to take advantage of this breakthrough.[162] Some technical information is also out of date because new types of noise problems have arisen since the information was generated.[163]

6. State and Local Regulation

Regulators and consultants agree there was a significant decline in active state and local noise programs after ONAC was abolished,[164] but there is no reliable data concerning the extent of the decline. EPA officials believe that only a handful of states have on-going noise abatement programs,[165] and available data indicate a decrease in on-going local programs from 300 to 400 in 1981 to 50 to 75 programs today.[166]

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[161] Feith interview, supra note 50; *see also* Luz Comments, supra note 16, at 1 ("Without a central ONAC to which to appeal, we are vulnerable to the vagaries of opinions from persons [in the EPA regions] who do not have professional expertise in noise assessment.")

[162] Maling Letter, supra note 160, at 5; Gomez interview, supra note 10.

[163] Feith, supra note 16. For example, communities are finding that without technical assistance it is difficult to know how to write ordinances to protect home owners from noise that travels along the interior common walls of townhouses and condominiums. Caccavari interview, supra note 92 .

[164] *E.g.*, Bragdon interview, supra note 160; Feith interview, supra note 16; Gomez interview, supra note 10.

[165] Transportation Noise, supra note 130, at 10.

[166] There are two problems in estimating the decline. First, it is not clear how many programs were in existence at the time ONAC was disbanded. In 1981, EPA told Congress that over 1,000 municipalities and 27 states had noise control legislation, but that only 13 states and 160 local communities had "on-going active noise control programs which are enforced today." *Reauthorization Hearings*, supra, note 112, at 35 (Statement of Walter C. Barber, Jr., Deputy Administrator, EPA). A governmental unit is considered to have an on-going effort if one or more employees have noise abatement as a continuing part of their responsibilities. *Id*. There is some evidence, however, that the number of on-going programs may have been higher. In 1981, over 300 communities sent a representative to a conference sponsored by ONAC to plan the transfer of regulatory responsibility to local governments. Unified Industries Inc., A Case Study of The Closing Of A Federal Activity: A Report Prepared for ONAC 3-5 (1982). In addition, the National Association of Noise Control Officials (NANCO) had approximately 400 members at its zenith, although some of these persons were consultants. DiPolvere interview, supra note 135.

Although the number of communities has declined, the scope of abatement efforts has been broadened in the communities that remain active. Whereas early local efforts focused on emissions limitations, noise abatement tools now include land use planning (including zoning, subdivision regulation, and site design review), environmental impact assessment, real estate disclosure requirements (such as requiring sellers to disclose noise levels on their property), and impact fees (based on the level of noise emissions).[167] For example, in California, where there is probably the most noise abatement activity in the country, cities use land use planning (such as specifying that noise sensitive land uses, such as hospitals and schools, be located and designed to reduce noise), development of loop roads to reroute traffic away from neighborhoods, and building codes (such as requiring that new structures must use soundproofing material approved by a city before a building permit is issued).[168]

Except for a few places like California, however, local regulation is in "disarray."[169] Cities apply widely varying approaches to noise abatement, sometimes including unrealistic emissions limitations.[170] This "fragmented noise policy" not only poses a problem for companies subject to more than one set of regulations (such as electrical utilities which operate in two or more different cities), but it makes it generally difficult for the business community to plan future activities.[171]

7. Private Rights of Action

In the absence of effective governmental noise abatement programs, persons adversely affected by noise can seek a tort remedy. The tort system and the regulatory system are two methods by which society can achieve an

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The second problem is estimating the number of current, on-going programs. A report done for EPA in 1990 concluded that of 93 communities that responded to a survey, 76 had some type of on-going program. J. Soporowski, III, *The Status of Key State and Local Noise Control Programs That Served As A Basis For Discontinuing A Federal Program*, Jan. 22, 1990, at 41. The study reasonably inferred that many, if not most, of the 112 municipalities that did not respond to the survey probably no longer had on-going programs. *Id.* The experience of the National Association of Noise Control Officials (NANCO) provides some indirect evidence that there has been a substantial decline in local and state efforts. NANCO membership has declined from a high of approximately 400 persons to its current membership level of 50 persons. DiPolvere interview, supra note 135.

[167] Bragdon interview, supra note 160.

[168] Transportation Noise, supra note 130, at 66.

[169] DuBois interview, supra note 75.

[170] *Id.*

[171] *Id.*

answer to the same question: what mix of environmental pollution and protection is acceptable. Moreover, while the two systems in theory can produce the same answer or result, the environmental movement which started in the 1960s was motivated, in part, by recognition that problems associated with tort remedies made this approach less satisfactory than a regulatory approach.[172] While nuisance law has been used to abate noise pollution,[173] this general lesson holds for noise pollution as well.

The neighbor(s) of a land owner who emits loud noises can seek monetary and/or injunctive relief by alleging that the land owner's activities constitute a "private nuisance," except in the case of railroad and motor carrier noise sources, where tort suits are apparently preempted.[174] To prevail, the plaintiff would have to demonstrate that:

> (1) the noise interfered with the plaintiff's property interest, such as by causing the plaintiff health problems or by limiting some of the ways that the plaintiff's property could be used;[175]
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> (2) the interference with the plaintiff's land use resulted in a significant or substantial harm;[176]

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[172] *See* F. Anderson, D. Mandelker & D. Tarlock, Environmental Protection: Law & Policy 64-65 (1990); Sevinsky, *Public Nuisance: A Common Law Remedy Among The Statutes*, 5 NAT. RES. & ENV. 29, 30 (1990).

[173] *See* W. Rodgers, Handbook on Environmental Law §5.3 (1977).

[174] As noted earlier, the NCA states that a state or local government may not employ any "controls on levels of environmental noise" unless EPA approves.

[175] Restatement (Second) of Torts §§821D-E (1979) [cited hereinafter as "Restatement"]. If the defendant's conduct does not interfere with the use and enjoyment of a plaintiff's property, the plaintiff can allege a "public nuisance." A public nuisance is the unreasonable inference with a right common to the public, such as the public health, safety, and convenience. *Id.* §821B. Most of the elements of private and public nuisances are the same. An individual who brings a public nuisance action, however, must have an injury that is distinguishable from that sustained by other members of the general public. *See* Rothstein, *Private Actions For Public Nuisance: The Standing Problems*, 76 W. VA. L. REV. 453 (1974); Hines, *Nor Any Drop To Drink: Public Regulation of Water Quality*, 52 IOWA L. REV. 186, 198 (1966). Otherwise, the proper party to bring such an action is the public official charged with the responsibility of abating Noise Pollution. Hines, *supra*, at 198.

[176] Restatement, supra note 14, at §821F; W. Rodgers, supra note 12, at 107.

> (3) the defendant either acted with the purpose of causing that harm, or knew (or should have known) that the harm was likely to result from the noise;[177] and
>
> (4) the invasion is "unreasonable" because the gravity of the harm of the plaintiff outweighs the utility of the defendant's conduct.[178]

Tort remedies will work satisfactorily only if individuals who are harmed actually sue. But the harm to individual property owners may be too small to merit a law suit, and the transaction costs of joining multiple property owners may prevent a class action. Moreover, even if some plaintiffs are successful, there may be no reduction in the amount of noise pollution since reducing the level of noise is often significantly more expensive than paying out claims to the few plaintiffs who file and successfully maintain nuisance suits. Even if all persons who are actually harmed sue, some will fail because it is often difficult for a plaintiff to prove some elements of actionable nuisance.[179] For example, while scientific evidence may establish that there is a probability that noise causes loss of hearing or other harmful health effects, the same evidence does not prove individual causation.

In addition, since the producers of noise pollution, such as railroad yards, truck terminals, and manufacturing plants, have a considerable amount of economic and social value, the injury to the plaintiff(s) will have to be substantial before a court will decide the fourth element of the nuisance test in favor of a plaintiff.[180] Professor Rodgers reports:

> Thus, the case law stresses the extent and degree of the hurt, with a number of cases declining injunctive relief where the noise was thought to be only sporadic or intermittent, or merely annoying, without constituting a serious health hazard, or speculative, or not "substantial" enough to justify recovery under an objective test of whether it would injure a normal person. . . . Similarly, in determining whether a noise nuisance exists, and particularly in fashioning an

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[177] Restatement, supra note 15, §§822-25.

[178] *Id.* §§826-31. A plaintiff can also establish the invasion is unreasonable if the harm to the plaintiff's land is serious and the financial burden of compensating for this and similar harm to others would not render it unfeasible for the defendant to continue the activity. *Id.*

[179] *See* Rychlak, *Common-Law Remedies For Environmental Wrongs: The Role of Private Nuisance*, 59 MISS L. REV. REV. 657, 681-82 (1989).

[180] *See* W. Rodgers, *supra* note 12, at 118-119; Note, *State Air Pollution Control Legislation*, 9 B.C. INDUS. & COMM. L. REV. 712, 716 (1968).

> appropriate remedy, courts have stressed the value of defendant's enterprise . . . .[181]

Finally, even if a court determines that the defendant's interference with the plaintiff's land is "unreasonable" under the fourth element, courts will apply a second "balancing" test to determine whether to grant injunctive relief,[182] which involves an even more open-ended test concerning the equity of the plaintiff's and defendant's positions. If the court does not grant injunctive relief, plaintiffs are forced to sue again once defendant's activities create additional damages.

In comparison to nuisance suits, regulatory approaches to reducing noise pollution have five advantages. First, noise reduction does not depend on whether plaintiffs have sufficient wealth to bring tort suits. Second, the decision of how much noise pollution should be tolerated is made in one proceeding, open to participation by all interested parties, by decisionmakers with access to relevant scientific and economic expertise. As Professor Hines notes:

> Litigation is fortuitous in its timing, in the type of case that may arise, and in the quality of the presentation that may be made for each side. An effective program of pollution control requires that the control agency possess considerable expertise in the area of regulation and that it have the capacity to plan ahead for anticipated problems. Courts are manifestly not endowed with these features.[183]

Third, a regulatory body is in a position to define clearly what conduct is expected of those who emit noise. By comparison, the tort approach, which involves two ad hoc balancing tests, makes it very difficult to predict the prospects for success in a nuisance action involving industrial pollution.[184]

Fourth, an agency is empowered to control pollution regardless of whether it impacts on a person's property. By comparison, a person can rely on the tort of nuisance only in cases where the person's enjoyment of his or her property is affected.

Finally, an agency is able to administer a flexible program that involves remaining in contact with the regulated parties so that they comply with the agency's orders. By comparison, "[t]he traditional reluctance of courts to issue an affirmative order under equity powers requiring the carrying out of some tasks demonstrates the limited effectiveness of a court centered pollution control program."[185]

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[181] W. Rodgers, supra note 12, at 559-60.

[182] *See* W. Rodgers, supra note 12, at 118, 120; Rychlak, supra note 18, at 692.

[183] Hines, supra note 14, at 200.

[184] *Id.* at 200-201; Glicksman, *A Guide To Kansas Common Law Actions Against Industrial Pollution Sources*, 33 U. KAN. L. REV. 621, 650 (1985).

The previous analysis does not establish that tort remedies are unimportant in obtaining protection from noise pollution.[186] It does suggest, however, that sole reliance on tort remedies is unlikely to achieve the same degree of protection as a regulatory approach. This is the conclusion that has been reached in every other area of environmental protection, and there appears to be no basis on which noise pollution can be distinguished.

The previous discussion assumes that tort remedies are not preempted by the NCA. The Supreme Court has expressed reluctance to find that state tort remedies are impliedly preempted,[187] and the NCA contains no express preemption provision. Indeed, the NCA seems to preserve common law rights of action.[188] Nevertheless, the courts have held that tort actions in some fields of health and safety are preempted by federal regulation.[189] Were the courts to take that position concerning the NCA, possibly outmoded EPA emission and labeling standards might be raised as a defense.

D. The Current Status of Noise Abatement

With the elimination of ONAC, EPA's regulatory and coordination activities have been reduced to a trickle. Available information indicates that there has been a decline in the number of on-going state and local noise control programs although the magnitude of that decline can not be documented. Nevertheless, when this trend is added to the reduction in EPA's activities, there can be little doubt that there is less governmental activity devoted to abating noise than there was 10 years ago.

What is less clear is how much noise pollution exists at the current time in the United States. The last study of the extent of noise pollution occurred in

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[185] Hines, supra note 14, at 200.

[186] *See* W. Rogers, Environmental Law and Water 29 (2d ed. 1986) (public nuisance law useful adjunct to statutory law in abating pollution).

[187] *See* Silkwood v. Kerr-McGee Corp., 471 U.S. 707 (1985).

[188] Congress empowered citizens to sue to enforce the emissions standards promulgated by EPA, but it also said that it did not intend to restrict "any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any noise standard control requirement. 42 U.S.C. §4911.

[189] *See e.g.*, Cippollone v. Liggett Group, Inc., 789 F.2d 181 (3rd Cir. 1986), *cert. denied* 479 U.S. 1043 (1987).

1980.[190] Nevertheless, "it is safe to assume that noise in communities is increasing."[191] Noise is directly related to population growth and the urban population in the country is increasing at twice the rate of the nonurban population.[192] Moreover, since there has been growth in the airline, trucking, and construction industries, these noise sources have likely increased. Regulation may have mitigated the extent of the increase, but EPA has been effectively disabled from enforcing its standards by budget constraints[193] and there are questions about the adequacy of the standards enforced by DOT.[194] Moreover, there are no federal standards for other noise sources, such as almost all construction noise,[195] and state and local regulation has declined significantly.[196] Moreover, industry research and development concerning the development of quieter products has slowed to a trickle, in part, because of the removal of any meaningful threat of regulation.[197]

EPA should commission a new study to determine the extent of noise pollution in the United States.[198] Although EPA has in the past relied on estimates of the extent of noise pollution,[199] this time it may be better to commission a study that would take actual measurements of ambient noise levels and noise sources. This would not only provide a more accurate baseline for future abatement efforts, but it would give EPA more credibility for restarting implementation of the NCA.[200]

While the exact scope of the need for additional noise abatement is uncertain, health professionals believe that additional regulatory activity is warranted. A consensus development conference held at the National Institute of Health (NIH) in 1990 found that "[h]earing loss from nonoccupational sources is common" and "public awareness of the hazard is low."[201] It concluded that "[i]nconsistent compliance and spotty enforcement of existing government regulations have been the underlying cause for their relative ineffectiveness in preventing NIHL [noise induced hearing loss]" and that a "particular unfortunate occurrence was the elimination of [ONAC] in 1982."[202] The American Academy of Audiology,[203] the American Speech-Language Association,[204] and the National Hearing Conservation Association[205] all agree with the NIH conclusions. And a "Proposed National Strategy for the Prevention of Hearing Loss" published by the National Institute of Occupational Safety and Health (NIOSH) in 1988 calls on Congress to reestablish the type of educational, research, and coordination activities undertaken by ONAC as important elements in a long-term strategy to reduce noise-induced hearing loss.[206]

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[190] Bolt, Beranek & Newman, Noise in America: The Extent of the Problem (July 1981).

[191] Suter, Report To The Administrative Conference, November, 1991 (cited hereinafter as "Suter Report"].

[192] *Id*; *see also*, Letter from Howard Stone, Jr., Executive Director, Self-Help For Hard of Hearing People, Inc (SHHH), to David Pritzker, ACUS (Apr. 19, 1991) ("Without a concentrated effort to prevent it, noise levels will increase.").

[193] *See* supra note 126 & accompanying text (discussion of EPA enforcement).

[194] *See* supra note 131 & accompanying text (discussion of standards enforced by DOT).

[195] Appendix I *infra*. State and local efforts abate some of the noise generated by these sources, although there are reasons to doubt the adequacy of local regulation in many jurisdictions. *See supra* note 164 & accompanying text (discussion of paucity of local noise abatement efforts).

[196] Note supra 164 & accompanying text.

[197] Kessler Letter, supra note 94, at 2.

[198] *See* Letter from William Melnick, Noise Advisory to the Executive Committee, American Academy of Audiology, to David Pritzker, ACUS (Mar. 27, 1991), at 2 ("Relying on data obtained a decade or even 2 decades ago can be misleading.")

[199] *E.g.*, note 190 supra.

[200] Von Gierke interview, supra note 74.

The health community's support for renewed federal activity is based on research identifying the health and welfare consequences of noise. Proof of noise-induced hearing loss, which has been "extensively researched" and is "no longer controversial," comes from the industrial context, but there is "growing evidence" of hearing loss associated with leisure time activities, loud music, and other sources of nonoccupational noise.[207] Noise has also been implicated in the development or exacerbation of a variety of other health problems, ranging from hypertension to psychosis.[208] Among the ways that noise degrades the quality of life is by contributing to sleep disturbance,[209] interrupting communications,[210] and increasing anxiety and anti-social behavior.[211]

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[201] National Institute of Health, Consensus Statement: Noise and Hearing Loss 16 (1990) [cited hereinafter as "Consensus Statement"]. The statement was prepared by a nonadvocate, nonfederal panel of experts based on presentations by investigators working in the noise area and panel discussions.

[202] *Id.*

[203] Melnick Letter, supra note 198, at 1 ("The noise problem is still with us and continues to affect the living conditions of citizens of the United States.").

[204] Carney Letter, supra note 100, at 1 ("Based on current national health promotion and prevention agendas, reviving the ONAC is not only desirable but necessary.").

[205] NHCA Letter, supra note 100, at 1 ("Renewed activity [concerning the NCA] would provide tremendous benefits for the health and welfare of all Americans.").

[206] National Institute for Occupational Safety and Health, Proposed National Strategies for the Prevention of Leading Work-Related Diseases and Injuries: Part 2, at 56 - 60 (1988) [cited hereinafter as "NIOSH Strategies"].

[207] Suter Report, supra note 191, at 26.

[208] *Id.* at 47-49.

[209] *Id.* at 36. Sleep disturbance can also cause health problems if chronic. *Id.*

Congress and EPA have a unique opportunity. Enough time has passed that the benefits and detriments of ONAC's approach to noise abatement are now apparent. Assuming that additional abatement efforts are merited, the sections that follow discuss how to shape future abatement efforts in light of ONAC's experiences. Part II considers options for state and local noise abatement and Part III considers options for federal abatement.

II. Options For State and Local Noise Abatement

Local noise abatement has not prospered in the years since ONAC was disbanded. This itself suggests that ONAC's support of an infrastructure for local activity was an important catalyst. Nevertheless, the decline in local activity could also reflect local voters' lack of interest in noise abatement. This section examines the connection between federal support and local effort and concludes that cities and states would become more active in noise abatement if the federal government resumed its infrastructure activities. Congress could locate the responsibility of infrastructure support in some other agency or agencies, but EPA is still the best home for such an effort.

A. Why State and Local Regulation Declined

EPA told Congress that ONAC should be disbanded because an austere federal budget required that some current federal programs be eliminated, the benefits of noise control were highly localized, and noise control could be carried out by state and local governments without the presence of a federal program.[212] These arguments reflected a "rebuttable presumption" in favor of local regulatory programs that guided the Reagan administration.[213] Whenever possible, the administration sought to return control over "local lifestyles to local decisionmakers."[214]

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[210] *Id.* at 32. This problem can also be dangerous in some contexts. *Id.*

[211] *Id.* at 46. ("[E]ven modest noise levels can increase anxiety, decrease the incidence of helping behavior, and increase the risk of hostile behavior in experimental subjects.")

[212] *Oversight Hearing*, *supra* note 84, at 59.

[213] Grey, *Regulation and Federalism*, 1 YALE J. REG. 93, 93 (1983). Local programs were favored on the grounds they were more responsive to voters, *id.* at 94 (whereas local government is in "close touch" with its constituents, the federal government is "generally remote from the citizen's day-to-day lives and concerns."), and more efficient in solving local regulatory problems. Local government is more efficient because of the smaller size of its programs, *id.* (whereas local government "can operate modest streamlined programs tailored to meet local needs," federal programs are "often unmanageable in size and rely on unnecessary levels of

According to the Reagan federalism philosophy, noise is a local problem because noise pollution does not travel very far and it is quickly dissipated.[215] Accordingly, local regulation is more efficient since local government can more easily respond to different types of local conditions.[216] Requiring local governments to fund their own noise abatement means that they must decide whether this activity is more important than other responsibilities they have. The failure to fund noise abatement activities can therefore be attributed to the low priority given these activities by local governments.[217]

This argument, however, presumes that local citizens are informed about the risks and effects of noise. In fact, the public is generally uninformed about noise impacts.[218] In addition to this problem, the explanation has two other flaws. First, local regulation may become ineffective or inefficient without federal involvement.[219] Noise abatement by local governments is this type of situation. One reason is that ONAC's demise eliminated economies of scale that made noise abatement more affordable for local governments. In addition, by stimulating local noise abatement activity across the country, ONAC

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bureaucracy."), and because reliance on local government "fosters diversity and experimentation." *Id.* at 95. The presumption was rebuttable if local administration conflicted with other important goals, such as when the combined effect of disparate programs created intolerable burdens on interstate commerce. *Id.* at 96.

[214] *Id.* at 98.

[215] *Cf.* Mashaw & Rose-Ackerman, *Federalism & Regulation*, in the Reagan Regulatory Strategy: An Assessment 166 (G. Eads & M. Fix eds. 1984) (local regulation is appropriate for regulatory problems that do not spill over to other jurisdictions).

[216] *Cf. id.* at 118 (federal regulation has diseconomies of scale when regulation requires local information). This was the argument made by critics of EPA's garbage truck regulation. *See* supra note 112 & accompanying text (discussion of garbage truck regulation). Moreover, local governments have a wider variety of regulatory tools with which to address noise problems. *See* supra notes & accompanying text (describing local regulatory tools).

[217] The Reagan administration believed that federal subsidies stimulated local governments to undertake activities that they would not desire to pursue without federal intervention. Palmer & Sawhill, *Overview*, in The Reagan Record: An Assessment of America's Changing Domestic Priorities 16 (J. Palmer & I. Sawhill eds. 1984). It therefore preferred "dual federalism," which assigns each level of government independent and different responsibilities and, to the maximum extent possible, requires each level to find its own sources of funding to meet those responsibilities. Peterson, *The State and Local Sector*, in the Reagan Experiment: An Examination of Economic and Social Policies Under the Reagan Administration 166-67 (J. Palmer & I. Sawhill eds. 1982).

[218] *See* supra note 201 accompanying text.

[219] Mashaw & Rose-Ackerman, supra note 215, at 112, 121-22; *see also* G. Eads & M. Fix, Relief or Reform: Reagan's Regulatory Dilemma 209 (1984).

lessened the concern of cities and states that they would be disadvantaged in the competition for industrial development by addressing their own noise problems. Second, although the Reagan concept of dual federalism envisions that local governments will be given control over local problems, only a partial devolution actually occurred in the case of noise abatement. Because of preemption and related factors, local governments may be prevented, or at least discouraged, from regulating some important local sources of noise.

This section explores these two alternative explanations for the decline in local regulation. It demonstrates that although citizen lack of interest in noise abatement can not be dismissed as an explanation for the decrease in local efforts, the alternative explanations are more persuasive.

1. Infrastructure Support

Professors Mashaw & Rose-Ackerman suggest why the elimination of EPA support was an important factor in the nosedive in local activity. When the federal government creates the information that is used by local governments for their activities, there are significant economies of scale that lower the cost of local activity.[220] ONAC created economies of scale activity in two ways. First, because most communities lack any expertise in noise abatement techniques,[221] ONAC's sponsorship of training programs, intercity information exchange, creation of model ordinances, and so on, offered local governments an inexpensive means to obtain the necessary information and expertise necessary to create and maintain noise programs.[222] Second, ONAC's sponsorship of research created a scientific and technical basis for local and state noise control efforts that has not been replaced. For example, ONAC's "Levels Document" offered local officials authoritative guidance concerning the levels of cumulative noise that posed a danger to local citizens.

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[220] Since information relevant to the entire country can be most efficiently created by the federal government, federal participation can obtain economies of scale. Mashaw & Rose-Ackerman, *supra* note , at 118. For example, national institutes can conduct research, develop regulatory technologies, and test the safety of products. *Id.* The diseconomies of scale of producing this type of information on a local level can also be a reason for underregulation by local and state governments. *See infra* note & accompanying text. When no federal program exists to provide such information, each locality must generate it on its own. This not only makes local programs more expensive, it increases the total cost of such programs because of the duplication of local activity.

[221] Luz Comments, supra note 100, at 2; Gomez interview, supra note 10; DiPolvere interview, supra note 135. A government noise researcher explains:

> There were no resources for helping [local regulators] purchase state-of-the-art automated noise monitoring equipment to serve as a labor-multiplier, no experts which they could consult as to whether they were technically correct in their conclusions, and no opportunities for career development. At the same time, noise assessment is too arcane a subject to be left to nontechnical legislators. It is not clear that legislators understood the reasoning behind various aspects of the EPA's model community noise ordinance.

Luz Comments, supra. A local noise official adds that most communities are "afraid" of the technical complexity involved in noise abatement. Gomez interview, supra.

The elimination of the federal infrastructure has raised the cost of local noise control to the point where it is no longer affordable for most jurisdictions. Not only is noise abatement more expensive, but the federal infrastructure was eliminated at the same time that state and local governments were hit with significant decreases in federal aid.[223] Noise abatement is but one more victim of the massive shift in the financing of government from the federal government to the states.[224]

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[222] *See* NHCA Letter, supra note 100, at 3 ("Without federal technical support and funding, [state and local agencies] are unlikely to operate actively again."); Schomer Letter, supra note 93, at 2 (Demise of technical support "probably contributed more to the loss of state and local programs than did any other factor."); Stewart Letter, supra note 8, at 2 ("History has shown that, except for the largest states and cities, these local and state programs can not survive without support from a central resource.").

After the elimination of ONAC, cities have few inexpensive options to train their employees or otherwise obtain the necessary expertise. In addition, it is difficult for cities to find out about what existing training resources and expertise exist because, with the elimination of ONAC, no organization makes such information available. ONAC had funded programs run by National League of Cities that provided information and updates to its members. Various issues of the League's *Environmental Reporter*, for example, covered noise abatement and control. *See, e.g.*, National League of Cities Environmental Report Oct. 1, 1989; *id.*, Nov. 27, 1978; *id.*, July 29, 1978; *id.*, July 3, 1978. ONAC also published materials that informed cities how to write federal grant applications for funding from other agencies. *See* Environmental Protection Agency, Staff Resources For Noise Control, March, 1978.

[223] The existence of active noise control programs in some locations, such as Los Angeles county, *see e.g.*, Carlton, *When Californians Use Leaf Blowers, Life Is Less Mellow*, Wall St. J., Dec. 4, 1990, at ___ (eastern edition), does not contradict this analysis. Active programs tend to exist either where noise is an especially pressing problem or where programs were ongoing at the time ONAC was abolished. Although the cost of maintaining a program is now higher than before ONAC was abolished, the benefits from the program are also large where noise is a pressing problem. Gomez interview, *supra* note 10. In jurisdictions that had trained personnel prior to the time ONAC was abolished, the cost of maintaining the program is less than the start-up costs for a governmental unit without any preexisting effort. In most of these locations, however, the size of the program has been cut back. DiPolvere interview, supra note 135. Moreover, in many places where a noise program has been retained, it has been folded into some other department, such as the public health department, or the environmental protection department. Although this has preserved the program, noise control usually receives significantly less attention that previously because it is not the primary mission of the department in which it is located. Bragdon interview, supra note 160.

Reestablishing a federal infrastructure would increase the number of state and local noise control programs by decreasing the cost of starting and maintaining such programs, and the experiences of local noise control officials bear this out. When an association of California noise control officials has offered inexpensive training sessions, officials from dozens of California municipalities have signed up.[225] There has been similar interest in a NANCO program that certifies government employees as technically capable of running noise control equipment.[226] NANCO hopes to offer these services nationally, but it has been stymied by a lack of resources.[227] In addition, EPA officials[228] and noise consultants[229] report that since ONAC has been abolished, they have received hundreds of telephone calls seeking information about how to implement noise abatement activities.

2. Local Disincentives

Professors Mashaw & Rose-Ackerman also suggest that without federal involvement local regulation may be ineffective because there are local disincentives to regulate stringently.[230] Noise presents this type of problem. As noted earlier, noise often only affects a portion of the population in a city or state, and that burden may have been imposed on them by the other residents who wished to obtain the benefit of a highway, airport, or industry.[231] In other legislation, such as the Clean Air Act, Congress spoke to this problem by mandating a minimum floor of protection for all citizens, but the NCA contains no such requirement.[232] Although a similar approach is justified concerning noise,[233] Congress chose not to require a minimum level of protection by states and local governments.

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[224] *See* Wright, *The United States*, in Intergovernmental Relations and Public Policy 64-65 (B. Galligan, O. Hughes, & C. Walsh eds. 1990); R. Nathan & F. Doolite, The Consequences of the Cuts: The Effects of the Reagan Domestic Program on State and Local Governments (1983); Hinds, *Strapped, Big Cities Take Painful Steps*, New York Times, Jan. 6, 1991, at Y9 (national edition); Hinds & Eckhom, *80's Leave States and Cities In Need*, New York Times, Dec. 30, 1990, at A1 (national edition).

[225] Gomez interview, supra note 10.

[226] *Id.*

[227] *Id.*

[228] Feith interview, supra note 16.

[229] Bragdon interview, supra note 160.

[230] Local regulation may be ineffective for two reasons. First, local regulators have an incentive to adopt weak regulatory policies when they face a "prisoner's dilemma," *id.* at 117, or a situation where, lacking a mechanism to cooperate, players end up worse off by competing with each other. *See* D. Mueller, Public Choice II 9-10 (1989). State regulation can present a "prisoner's dilemma" because "states may all try to attract businesses to their jurisdictions through tax breaks and regulatory laxness." Mashaw & Rose-Ackerman, supra note 215, at 117. Second, because political jurisdictions have little incentive to produce regulatory benefits that do not accrue to that jurisdiction, they will underregulate problems that affect more than one jurisdiction. *Id.* at 116.

Congress' decision not to fund ONAC had two effects on local disincentives. First, Congress' decision sent a signal to citizens (and their elected leaders) that noise abatement was unimportant. That is, the failure to abate noise that affected some of a community's citizens was unimportant. Second, because ONAC's infrastructure activities stimulated noise abatement activity across the country, it minimized fears that a city or state would be disadvantaged in the competition for economic development by imposing noise abatement requirements.

State and local noise control officials concur in the previous conclusions. Terry Obteska, Manager, Noise Control Program, Air Quality Division, Oregon Department of Environmental Quality, has written the Administrative Conference:

> The demise of the federal program in 1981 has been a disastrous experiment, resulting in the wholesale death of state and local programs. . . .

Dismantlement of the national noise control effort produced predictable results. Without a federal program, the linchpin of the network, it became politically expedient to classify noise pollution as a "nuisance" and cancel programs under the pretext that it was a cost savings measure. Paradoxically, the costs borne by those exposed to airport, highway, railway, and other egregious noise products, if calculated, are by no means insignificant.[234] Mr. Obteska reports that he expects Oregon to eliminate the state's noise control program in the near future in response to the lack of federal support and declining state resources.

A letter from Edward DiPolvere agrees that the lack of any federal program is a key factor in the decision by states to eliminate their own noise control efforts:

> It was clear to me back 10 years ago that once EPA disbanded its ONAC program that the weak State and local programs would soon die. Unfortunately, that was the case; even worse, most strong programs also died within the next

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[231] *See* supra note 8 & accompanying text.

[232] Note supra & accompanying text.

[233] Note 25 supra.

> few years. The New Jersey program was cut in half in 1981 and has just been bumping along since then. The proposed New Jersey budget for 1992 fiscal year which starts in a few months (July 1, 1991) does not include any funding for Noise Control. So one of the longest ongoing and strongest programs will also die. And it's easier for a State to kill a program that has no form of matching subsidy federal funding or stronger link to public risk. In New Jersey we are in a severe budget crisis and many programs are being pinched or curtailed but only [the] Noise Control Program of 25 program classifications is being eliminated altogether.[235]

North Dakota's noise program has had a similar fate, which according to a letter from Dana Mount, Director, Division of Environmental Engineering, North Dakota State Department of Health, can also be attributed to the lack of federal support:

> North Dakota has had an active noise control program since 1971. . . . Since the phase-out of the EPA program, the State has been able to provide an extremely limited budget for noise control. . . .
>
> . . . Due to the State's current financial concerns and shifts in priorities, the State's noise control law was repealed by the Legislature this year and will effectively phase out completely on July 1, 1991.
>
> We believe that there is a need for a strong noise control program within EPA, that includes extensive support for State noise control programs.[236]
>
> Ellwyn G. Brickson, Noise Control Specialist, Environmental Health Division, Orange County, California, tells a similar story: When the EPA reduced their personnel from 175 to 0, the State of California ONAC also reduced the staff from 5 to 0. The biggest reason for decline in noise

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[234] Letter from Terry L. Obteska to David M. Pritzker, ACUS, May 8, 1991.

[235] Letter from Edward DiPolvere to David M. Pritzker, ACUS, May 1, 1991.

[236] Letter from Dana K. Mount to David M. Pritzker, ACUS, June 3, 1991.

> abatement programs is simply a lack of funding. The noise problems are still being discovered.[237]

Peter Nichols, Director of Environmental Health Services, City of Norfolk, Virginia, writes that he was able to start a noise control program because of the training he received from ONAC. He concludes, "The possibility of a federal community noise control program being re-established is exciting . . . I support any efforts to re-establish a federal noise control program."[238]

3. Federal Preemption

Finally, the decline in local noise abatement might be attributed, in part, to federal preemption. The extent of preemption varies concerning product standards, transportation standards, and labeling, but these differences do not affect the conclusion that states and local governments are generally unable to remedy the problem that some of EPA's noise standards are obsolete.

Since the NCA preempts states and political subdivisions from imposing their own emissions standards on new products that are regulated by EPA,[239] these levels of government can not promulgate different emissions standards for air compressors, motorcycles, and medium and heavy duty trucks, which are covered by product standards promulgated by ONAC.[240] State and local governments are not preempted, however, from controlling noise emitted by these sources by the use of other regulatory tools, such as restriction of use, operation or movement, and they can enforce the EPA standards by adopting identical limitations as their own laws or ordinances.[241]

Since EPA regulated only three products, the effects of preemption concerning product regulation are narrow. And EPA's lack of enforcement could be overcome if other levels of government adopted the EPA standards as their own. To the extent that the EPA standards are obsolete, however, local enforcement of EPA's standards would be inadequate. Moreover, alternative methods of enforcement may not work in all circumstances. For example, local noise regulators have complained that EPA's new truck regulations in some cases preempted stricter local emissions regulations.[242] As a result, a city may lack any effective mechanism to abate the noise from delivery trucks. Time and place restrictions could be employed, but it may be impractical to cut off access to local businesses during business hours. Zoning and land planning restrictions likewise would have no efficacy against mobile sources of noise. The city may also not be able to regulate the warehouse area where the trucks are located. A land owner could be exempt from any change in zoning if the prior use of the land qualifies as a nonconforming use exempt from ex post zoning changes.[243]

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[237] Letter from Ellwyn G. Brickson to David M. Pritzker, ACUS, May 20, 1991.

[238] Letter from Pete C. Nicholas to David M. Pritzker, ACUS,Apr. 24, 1991.

[239] 42 U.S.C. §4905(e)(1).

[240] *See* Appendix I.

[241] 42 U.S.C. §4905(e)(1).

[242] *E.g.*, *Reauthorization Hearing*, supra note 112, at 24.

States and localities are preempted from regulating the same railroad or motor carrier noise emissions regulated by EPA by any form of regulation (other than an emissions standard identical to the one promulgated by EPA) unless the agency grants a "special local circumstances" exemption permitting local regulation.[244] Since EPA has regulated railroad and motor carrier noise sources extensively,[245] the scope of this preemption is broader than the preemption of product regulation.

Likewise, the consequences for the public of such preemption are also greater. There is evidence that the transportation emissions standards have become obsolete, or are inadequate for other reasons.[246] States and local governments have no regulatory authority to resolve such problems unless EPA grants them an exemption. This solution, however, is problematic for three reasons. First, EPA has established a significant burden of proof to obtain an exemption, which has discouraged cities which have applied from pursuing this option.[247] Second, it is not apparent that EPA has the resources to respond to an application. Finally, EPA would have to turn down any regulatory initiative which placed a significant burden on a railroad or trucker's capacity to operate in interstate commerce. This constraint may limit cities from adopting the most effective noise controls.

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[243] D. Hagman, Urban Planning and Land Development Control Law 146-47 (1975).

[244] 42 U.S.C. §§4916(c), 4917(c). In *Baltimore & Ohio Railroad Co* v. *Oberly*, 837 F.2d 108 (3rd Cir. 1988),the Third Circuit held that Delaware was not preempted under the previous statutory language from regulating the noise emitted from trailers on flat cars (TOFCs) because EPA had not regulated this noise source:

> We therefore conclude that section 17(c) means what it says: once a federal noise regulation has taken effect, a state may not regulate (unless it promulgates a standard that is "identical to a [federal] standard," 42 U.S.C. 4916 (c)(1) (1982)), the same rail equipment or facility. Since EPA had regulated neither TOFCs nor noise emissions at property lines, the federal Noise Control Act and the regulations thereunder do not preempt the mere existence of Delaware's regulations of such equipment and facilities.

Id. at 114-15.

[245] *See* Appendix II.

[246] *See* supra Section IC4.

[247] *See infra* Section IIB2.

The NCA also provides for preemption concerning labeling standards. States and local governments can establish their own labeling standards only to the extent they do not conflict with federal standards.[248] There is one federal labeling standard for hearing protection devices, which is misleading because it does not accurately reflect the degree of hearing protection the devices provide under actual conditions of use.[249] But there is no role for state or local governments in addressing the misleading nature of the label. Even if state or local labeling is not preempted, which it appears to be, most local jurisdictions lack the technical and informational capacities to promulgate labeling requirements. Moreover, local labels would lead to substantial confusion for consumers who would find two labels with conflicting information.

In light of the previous preemption, cities may not find it cost effective to start (or maintain) a noise abatement program when they are effectively prevented from addressing some significant local sources of noise. The extent to which federal preemption has actually discouraged starting or maintaining local programs is unknown. It may not be an important factor since the scope of EPA regulation is fairly narrow and many important noise sources remain unregulated.

Some cities, however, may be discouraged from regulating because of industry claims of preemption in cases where such claims are dubious or erroneous.[250] A recent case, where the federal government assisted an industry to make a dubious claim of preemption, illustrates this potential. The government filed a brief in a lawsuit that the American Association of Railroads and two local railroads brought against Delaware which claimed the noise emitted from refrigerated trucks mounted on railroad cars violated the state's noise emission limits.[251] The Third Circuit Court of Appeals cited EPA's brief, which argued the state was preempted from regulating, as the reason for affirming the district court's injunction against state enforcement.[252] But when Delaware appealed the case to the Supreme Court, the Solicitor General told the Court that government's position was legally erroneous and he asked the Court to remand the case back to the Circuit Court for reconsideration.[253] After the remand, the Third Circuit reversed itself and held that Delaware could enforce its regulation.[254]

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[248] 42 U.S.C. §4907(c).

[249] *See* supra note 137.

[250] Feith interview, supra note 16 (industry claims of preemption have discouraged local noise initiatives in cases where such claims were dubious).

[251] Appellant's Jurisdictional Statement at 4, Oberly v. Baltimore & Ohio Railroad Co., 479 U.S. 980 (1986) [cited hereinafter as "Jurisdictional Statement"].

[252] Baltimore & Ohio Railroad Co. v. Obey, 782 F.2d 29, 30 (3rd Cir. 1986) (per curiam), *aff'm*. 606 F. Supp. 1340 (D. Del. 1985).

While it might be expected that the Third Circuit's decision has clarified the power of local governments to regulate some aspects of railroad operations, the matter may still represent a muddle to many localities. An EPA official attributes the lack of local regulatory activity, in part, to the fact that many localities may have not heard about the decision.[255]

C. Policy Options

State and local noise regulation lacks a bright future unless the federal government reestablishes the type of scientific, technical, training, educational, and other "infrastructure" activities that EPA supported at the end of the 1970s. Far from usurping local initiative, federal support is necessary to empower communities to act against noise pollution. It is less clear what actions EPA (or Congress) should take regarding federal preemption, but some reduction in federal preemption appears possible.

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[253] Brief for the United States as Amicus Curiae at 6, n.6, Oberly v. Baltimore & Ohio Railroad Co., 479 U.S. 980 (1986). The Solicitor General told the Court that the government's support of the railroad's position had not been approved by high level officials in the Department of Justice or the Solicitor General's Office:

> The court of appeals noted that in an amicus curiae filing made at the court's request, the Environmental Protection Agency agreed that the federal regulations preempt application of state noise regulations . . . . Regrettably, because of a failure of communication, that brief was filed in the court of appeals without having been brought to the attention of either the Assistant Attorney General for Land and Natural Resources or the Solicitor General, and therefore without the former's approval or the latter's authorization.

Id.

[254] Baltimore & Ohio Railroad Co. v. Oberly, 837 F.2d 108, 110 (3rd Cir. 1988). EPA's 1974 railroad noise emission standards covered locomotive operations under stationary and moving conditions and rail car operations. 39 Fed. Reg. 24580 (1974). The D.C. Circuit construed the NCA to require EPA to regulate all railroad "equipment and facilities" including the equipment and facilities omitted by EPA from its regulation. Association of American Railroads v. Costle, 562 F.2d 1310 (D.C. Cir. 1977) EPA promulgated additional standards, 45 Fed. Reg. 1263 (1980), *amended at* 47 Fed. Reg. 14709 (1982) (codified at 40 C.F.R §201 (1990)), but some aspects of railroad operations, including refrigerated trucks, were left unregulated. Because EPA had declined to regulate refrigerated trucks, Delaware contended that it was not preempted from regulating them. Appellant's Brief In Reply To Motion To Affirm, at 3-4, Oberly v. Baltimore & Ohio R.R. Co., 479 U.S. 980 (1986). EPA responded that because it had justified its decision not to regulate additional noise sources on the ground more regulation was "unnecessary" to abate railroad yard noise, it had preempted any local regulation. 782 F.2d at 30. The Third Circuit, however, declined to give EPA's decision preemptive effect because its statements in 1982 did not clearly indicate that this was its intent. 837 F.2d at 115.

[255] Feith interview, supra note 16.

1. Infrastructure Support

If the cost of starting and maintaining noise control programs was lowered, cities and states would be more likely to increase their noise abatement efforts. Federal involvement would also lower the national cost of abatement. Moreover, EPA's experience in the 1970s suggests that a worthwhile program could be established at a fairly low cost to the federal government.

The panel of experts convened by NIH[256] and a NIOSH report[257] called for reestablishing the type of infrastructure activities that EPA supported while ONAC operated. This conclusion is supported by noise consultants,[258] health professionals,[259] and local regulators,[260] although there is some disagreement concerning what steps EPA should take. For example, some professionals support establishing a computerized database of technical information that they can easily access,[261] but others believe this would not be a useful step.[262] The

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[256] Consensus Statement, supra note 201, at 21.

[257] NIOSH Strategies, supra note 206, at 57-58.

[258] Letter from Edward Clark, Ostergaard Acoustical Associates, to David Pritzker, ACUS (Mar. 18, 1991) (EPA should underwrite research for quieting noise sources and help develop community noise control criteria or guidelines); Letter from Walter Eversman, Chairman, Noise Control and Acoustics Division, American Society of Mechanical Engineers, to David Pritzker, ACUS (Mar. 27, 1991), at 1 ("ONAC should provide a technical infrastructure which supports governments."); Letter from Kevin Lowther, Member, Board of Directors, Institute of Noise Control Engineering, to David Pritzker, ACUS (Mar. 28, 1991), at 2 (federal government should fund studies that "enhance the database of noise emissions from consumer and industrial equipment"); Letter from Nancy Timmerman, President, Institute of Noise Control Engineering, to David Pritzker, ACUS (Mar. 29, 1991) ("A clearinghouse of information on noise control can be useful."); Maling Letter, supra note 160, at 5 (EPA should rewrite its model noise ordinance, its "Levels Document," support university teaching and research, and publication of technical information.); Stewart, supra note 8, at 6 ("Disgrace" that technical experts must depend "so heavily" on testing and research done by National Research Council of Canada).

[259] Melnick Letter, supra note 198, at 1-2 (noise research is now "almost nonexistent" and "needs to be done"); NHCA Letter, supra note , at 2 (research programs on the general health effects of noise are "invaluable" and "need to be initiated again")

[260] *E.g.*, DiPolvere Letter, *supra* note 94, at 3.

[261] *See e.g.* Letter from Martin Hirschon, President, Industrial Acoustics Co., Inc., to David Pritzker, ACUS (Mar. 8, 1991) (computerized data "could be of great value"); Letter from Kevin Lowther, Member, Board of Directors, Institute of Noise Control Engineering, to David Pritzker,

NIH and NIOSH reports also recommend a comprehensive program of public education concerning noise with special attention directed towards school-age children.[263] And EPA's Scientific Advisory Board (SAB) has noted as a general matter that EPA should improve public understanding of environmental risks as one of its strategies for risk reduction.[264]

Congress would not have to locate federal infrastructure activities in EPA. Two arguments can be made on behalf of location in other agencies. First, some previous management officials in EPA have not been enthusiastic about

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ACUS (Mar. 28, 1991) (computerized database "must be exploited"); Glaser Letter, *supra* note 100. at 2 (computerized database would be a "boon" to professionals); Kessler Letter, supra note 94, at 5 ("If EPA does nothing else, it should assemble and have available databases."); Maling Letter, supra note 160, at 5 ("EPA should maintain a computerized 'noise bulletin'."); Stewart, supra note 8, at 5 ("It would be nice to have a really good computerized database").

[262] Memorandum from David Stephens, Chief of the Acoustics Division, NASA Langley Research Center, to Harvey Hubbard (Mar. 8, 1991), *in* Letter from Harvey Hubbard to David Pritzker, ACUS (Mar. 12, 1991) (computerized database would "not be a productive exercise" for EPA); Melnick Letter, supra note 198, at 2 (computerized database would be "extremely" useful); *but see* Luz Comments, supra note 100, at 3 (no need to duplicate "excellent" computerized databases developed through Air Force funding); Toothman, supra note 94, at 2 (computerized database could be "useful" but should be privately developed).

[263] The NIH group concluded that "[h]igh visibility media campaigns are needed to develop public awareness of the effects of noise on hearing and the means of self-protection. Consensus Statement, supra note 201, at 18. It recommended:

> Educational programs should be targeted toward children, parents, hobby groups, public role models, and professionals in influential positions, such as teachers, physicians, audiologists, and other health care professionals, engineers, architects, and legislators. In particular, primary health care physicians and educators who deal with young people should be targeted through their professional organizations. . . .

Id. at 17-18.

The NIOSH study recommended that long-term objectives for information dissemination should include efforts to:

> Inform the public of the need to protect hearing to avoid the biological and social consequences of exposure to noise. All forms of media should be used. In addition, information shall be distributed to large public gatherings, such as state and local fairs, health conventions, etc.

Develop education programs and promote existing programs in primary and secondary schools and in universities for teaching the basic science of sound, including its hazards, and methods of self-protection.

NIOSH Strategies, supra note 206, at 58.

[264] EPA Science Advisory Board, Reducing Risk: Setting Priorities and Strategies for Environemntal Protection 24 (1990) [hereinafter cited as "SAB Report"].

its noise abatement mission.[265] Second, since EPA's primary mission is standard setting, the research and educational aspects of noise abatement would be better served if they were delegated to agencies that had research and education as primary objectives.

There are also good reasons for reestablishing EPA as the home of infrastructure efforts. While some infrastructure activities can be moved to other locations, others are not easily relocated. Congress could give the National Institutes of Environmental Health Sciences responsibility for health-related noise research and some other agency in the Department of Health and Human Services (HHS) the responsibility for public education,[266] but there is no obvious alternative home for infrastructure activities such as producing model ordinances, establishing universal measurement standards, and training enforcement personnel.[267] Congress could establish a new agency, modeled on the National Institute for Occupational Safety and Health (NIOSH), which performs similar functions concerning occupational safety and health, but the small scale of federal activities in this area may not justify a separate agency for that purpose.

In addition, parceling out infrastructure activities would make them less effective than locating them at EPA. If some infrastructure activities remain at EPA, locating others elsewhere would create coordination difficulties. For example, when the NCA was passed, Congress expected that EPA would be able to rely on noise research conducted by other agencies, but EPA found that because the other agencies followed their own research agendas, they produced very little research relevant to EPA's purposes.[268] Moving all infrastructure functions to a new agency would solve this type of problem, but there would be other coordination difficulties if EPA retains any regulatory functions.[269] OSHA's experience indicates this difficulty. OSHA and NIOSH have had continuous coordination difficulties because the former is located in the Department of Labor and the latter is in HHS.[270]

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[265] *See* supra note 52 & accompanying text (ONAC received grudging support from EPA, in part, because agency personnel did not view noise abatement as an important element of EPA's mission).

[266] The Department of Education might also play a role in the design of school education programs.

[267] A former director of ONAC recommends that infrastructure activities that could not be assigned to the National Institutes of Environmental Health Sciences be delegated to the National Academy of Engineering/National Research Council or that a National Advisory Commission on noise standards and control be established. Meyer Letter, supra note 51, at 1-2. He also supports assigning responsibility for maintaining a computerized database to the National Bureau of Standards. *Id.* at 2. The former director prefers these arrangements because he distrusts that EPA will be friendly to infrastructure activities. *Id.* at 1. The problem with this recommendation is that parceling out the infrastructure activities would create coordination problems. *See infra* 268 note & accompanying text. Since EPA may have a new attitude concerning infrastructure activities, *see infra* note 271 & accompanying text, it would be better to determine whether EPA will support such activities before they are transferred elsewhere.

[268] *Oversight Hearings*, supra note 84, at 18 (Testimony of David Hawkins, Assistant Administrator for Air and Waste Management, EPA).

Finally, EPA may be ready to turn over a new leaf regarding its attitudes towards infrastructure activities, if not noise abatement itself. The Scientific Advisory Board recently called on EPA to recast its mission to include not only a wider variety of environmental hazards, but also a greater variety of regulatory tools.[271] In particular, the SAB recommended that EPA use a welfare risk paradigm that recognizes "social nuisances" such as "odors, noise, and reduced visibility" that may or may not affect human health."[272] The SAB was not suggesting that noise might not also pose a health hazard, but it was saying that EPA should not treat its nonhealth effects as unimportant to environmental protection.[273] The SAB also told EPA that the "most promising strategies for risk reduction encompass a wide range of policy approaches" including scientific and technical measures, provision of information, and cooperation with other agencies.[274]

2. Preemption

Besides reestablishing infrastructure support, EPA should clarify the extent of federal preemption and minimize the scope of it. Clarification will assist local governments to resist erroneous industry claims that cities or states can not act. Minimizing the scope of preemption will empower local governments to act concerning local problems. While some preemption is unavoidable to protect firms from the costs of complying with inconsistent local regulation, there may be more preemption currently than necessary.

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[269] For example, if EPA retains the function of product labeling, it would have to coordinate its activities with the educational efforts of another agency.

[270] Shapiro & McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 58-59 (1989).

[271] SAB Report, supra note 264, at 6. A former director of ONAC cautions, however, that "EPA and Administrations (regardless of party) simply will not provide the resources to EPA to implement a federal noise control program within EPA." Meyer Letter, supra note 51, at 1. He recommends therefore that Congress place noise infrastructure activities elsewhere. See note 267 supra (describing recommendation). As related earlier, however, there are disadvantages to giving up on EPA as the home for such efforts. *See* supra note 239 & accompanying text. EPA should therefore be given an opportunity to indicate that it will support such activities, but Congress should monitor the agency's efforts to determine its level of support.

[272] EPA Science Advisory Board, Appendix A; Report of the Ecology and Welfare Subcommittee 34 (1990).

[273] *See* EPA Science Advisory Board, Appendix B: Report of the Human Health Committee 11 (1990) (Comparative risks should be judged according to their risks of contributing to cancer, other adverse health effects, ecological damage, and societal welfare).

[274] EPA Science Advisory Board, Appendix C: Report of the Strategic Options Subcommittee 33 (1990) [cited hereinafter as "Strategic Options"].

Federal regulation creates scale economies for firms that operate in interstate commerce if a uniform federal standard replaces conflicting state and local regulation,[275] and the preemption provisions of the NCA have such a purpose.[276] The disadvantage of preemption is that it can replace more stringent standards preferred by local governments.[277] But companies that operate in interstate commerce, such as product[278] and vehicle manufacturers,[279] and the railroads,[280] insist that they could not operate efficiently without extensive federal preemption. Nevertheless, some forms of local regulation, such as the erection of noise barriers, would appear to have little or no effect on transportation scale economies.[281] EPA could assist local governments by promulgating a standard that would establish criteria for granting special local circumstances exemptions for railroad and truck noise regulation.[282]

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[275] Mashaw & Rose-Ackerman, supra note 215, at 118 ("Uniform national regulation frequently produces economies of scale for private firms in interstate commerce.")

[276] Senate Report, supra note 17, at 7, 19. (1972). Moreover, the drafters understood that more extensive preemption was necessary for railroads and motor carriers. State and local governments may use time and place restrictions, such as zoning or licensing, to address noise emissions from products regulated by EPA, supra note 23, but EPA's approval is required to use these controls concerning railroad and motor carrier noise. Note 24 supra. EPA is authorized to permit local regulation if it is necessitated by special local conditions and local regulation would not be in conflict with EPA's regulation. *Id.* The NCA drafters included EPA approval because of "the need for active regulation of moving noise sources and the burdens placed on interstate carriers of differing State and local controls." Senate Report, supra note 17, at 19.

[277] Preemption was adopted over Senator Muskie's objection that the NCA was a "classic example" of how federal preemption weakens regulation by substituting less stringent federal standards for more stringent state and local regulations. Senate Report, supra note 17, at 21-22. A national association of noise control officials asserts that, as Muskie predicted, EPA standards have replaced, or prevented, stricter regulation of noise sources such as new trucks and motorcycles. Reauthorization Hearings, supra note 1112, at 24, 28 (Testimony of Jesse Borthwick, Executive Director, National Association of Noise Control Officials (NANCO)). An EPA official replies that the regulations adopted by ONAC were as stringent as the NCA permitted. Feith interview, supra note 50.

[278] *E.g.*, *Oversight Hearings*, supra note 84 , at 93-94 (Statement of James Arndt, Deere & Company).

[279] *Id.* at 124-127 (Statement of Motor Vehicle Manufacturers Assoc. of the U.S., Inc.).

[280] *Reauthorization Hearing*, supra note 112, at 2-4 (Statement of William Dempsey, President, American Association of Railroads).

[281] *Noise Control Oversight: Hearings Before The Subcomm. On Resource Protection Of The Senate Comm. on Environment and Public Works*, 95th Cong., 2d Sess. 69 (1978) [cited hereinafter as "*NCA Oversight*"] (Testimony of Larry Blackwood, Illinois Assistant Attorney General). Blackwood contends that some noise control problems created by railroad yards do not

III. Options for Rederal Noise Abatement

EPA can assist state and local noise abatement by reestablishing a support infrastructure and narrowing preemption of local regulation. This section evaluates what other abatement responsibility the federal government should undertake and concludes that Congress should fund EPA to implement the NCA, but that the agency should adopt a different regulatory strategy than it used previously.

A. Congressional Options

Congress has three choices concerning the future of the NCA. It must determine whether to continue or repeal it, and, if some or all of the provisions of the NCA are continued, Congress must decide whether EPA, or some other agency, is to be responsible for their implementation.

1. The Future of the NCA

Congress could continue the status quo, repeal the NCA, or fund EPA (or some other agency) to implement it, with or without restrictions on the scope of the agency's jurisdiction. Continuing the status quo saves money, but it also leaves EPA in an untenable position. Because of budget constraints, it can neither effectively enforce existing standards, nor amend them to take account of loopholes and other deficiencies that have been identified. Moreover, continuing the status quo prevents state and local governments, to

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require national uniformity of treatment because they can be solved by changes in equipment or practices, or by installation of noise control barriers, designed for a particular location. *Id.*

[282] EPA could make determinations concerning local exemptions without a standard. *See* 42 U.S.C. §§4916(c), 4917(c) (granting EPA the power to grant local exemptions). Without a standard, however, local governments have the responsibility to produce evidence that a local exemption is justified without prior notice concerning what standards EPA will use to weigh the evidence. Consider the case of Seattle, Washington, which sought a local exemption in response to petitions received from residents in a densely populated neighborhood near railroad switch yards. EPA responded that the noise measurement data supplied by the city was not consistent with the measurement methodology used to establish noise standards, and the city failed to submit a copy of the regulations that it proposed to enact. *See* Transportation Noise, supra note 130 , at 51-52. When EPA has made similar demands on other cities, they have given up obtaining an exemption. Feith interview, supra note 16.

some extent, from filling the regulatory void that the lack of funding has created.

Congress could repeal the NCA, or at least its preemption provisions, and free states and local governments to regulate more strictly, if they wish. But this choice merely recreates the conditions that led to passage of the NCA in the first place. As noted previously, preemption can provide important scale economies for firms that operate in interstate commerce.[283] Thus, unless Congress is prepared to forgo these economies of scale, a federal agency must be funded to enforce and, if necessary, update current regulations.

Congress could fund EPA (or some other agency) only to update and enforce current regulations. Or it could limit federal jurisdiction to regulate in some other manner. For example, the federal government could address only transportation noise.[284] Besides saving money, this approach has the advantage of maximizing the extent to which state and local governments would be free to regulate. Ultimately, however, this approach would be self-defeating. Additional targets for regulation exist,[285] and if state and local governments receive the informational and technical support recommended in the previous section, they will establish additional regulation. Demands by industry for federal preemption will quickly follow and Congress will have accomplished little by failing to have the federal government address these noise sources in the first place.

2. Location of Regulatory Activities

Congress could transfer EPA's regulatory responsibilities to other agencies which have mandates related to the regulation of transportation services and consumer products. But such a rearrangement would not increase the effectiveness of federal efforts.

Locating NCA standard-setting in other agencies has some advantages. Congress could delegate to DOT the authority to establish noise emissions standards for transportation.[286] This change would avoid the coordination problems that arise from splitting the responsibility to abate traffic noise between EPA and DOT, and it would permit DOT to coordinate more easily the use of other highway noise abatement techniques, such as noise barriers, with reliance on emissions controls. Congress could assign to the Consumer

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[283] Note 275 supra & accompanying text.

[284] *See* Transportation Noise, supra note 130 , at 74 (proposing option that EPA be funded to regulate Transportation Noise sources).

[285] *See* supra Section ID.

[286] *See* Transportation Noise, supra note 130 , at 75 (discussing moving responsibility for transportation standard setting to DOT).

Product Safety Commission (CPSC) the regulation of nontransportation products and to OSHA the labeling of hearing protection equipment. Since CPSC's mandate is to protect consumers from dangerous products,[287] the regulation of product noise emissions is congruent with its mission. Delegating to OSHA the responsibility to regulate hearing protection equipment makes sense since most consumers of protection equipment are employers and OSHA's hearing conservation standard depends on the accuracy of the labels used on hearing protection equipment.[288]

There are, however, also good reasons for leaving standard-setting at EPA. First, Congress would lose the synergism that is produced by placing most aspects of noise abatement in EPA. Conversely, dividing up the federal government's abatement activities will create substantial coordination difficulties. Assuming that EPA resumed support of an infrastructure for local regulation, four different agencies (DOT, CPSC, OSHA, and EPA) would be involved in noise abatement under the previous proposals. Second, parcelling out responsibilities to four different agencies will result in at least some duplication of staffing. Third, reassigning EPA's regulatory responsibilities will not necessarily result in more effective regulation since both DOT and CPSC have some liabilities that EPA does not share. For example, to the extent that DOT has responsibilities to promote transportation, as well as regulate it, it may lack the same credibility and motivation in regulating noise that EPA would have.[289] Moreover, CPSC's effectiveness has been questioned over the years.[290]

While there are arguments for locating EPA's regulatory responsibilities in other agencies, the coordination problems that would result counsel against such a step. If the purpose of a reorganization is to make the government's abatement efforts more effective, that result can hardly be accomplished by splintering responsibilities now primarily located in one agency into four different ones. While it is true that EPA managers were not always genial hosts to ONAC, as the prior discussion noted,[291] there are reasons to believe that agency managers will take this responsibility seriously. Moreover, there is no reason to believe that DOT or CPSC would be more committed to noise abatement, or would be more effective as regulators.

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[287] 15 U.S.C. §2051(b)(1) (1988).

[288] 29 C.F.R. §1910.95 (1990).

[289] Transportation Noise, supra note 130 , at 75; *see also* Letter from Sandford Fidell, Lead Scientist, BBN Systems and Technology, to David Pritzker, ACUS (Apr. 1, 1991), at 2 (No other agency besides EPA "has provided a consistent interpretation of noise effects research uncolored by institutional interests"); Stewart Letter, supra note 8, at 3 (Agency "that does not have a conflict of interest is very much needed" since a "first objective" of FAA, FHWA, and HUD "is to set criteria which allow their projects to be built.").

[290] Tobias, *Revitalizing The Consumer Product Safety Commission*, 50 MONT. L. REV. 237 (1989); Adler, *From "Model Agency" To Basket Case--The Case of The Consumer Product Safety Commission*, 41 AD. L. REV. 61 (1989); Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32 (1982); Tobias, *Consumer Agency Falling Down On The Job*, Legal Times, Mar. 20, 1989, at 19, c. 1.

B. EPA's Options

Since EPA should retain the responsibility for implementing the NCA, it is important that the agency carefully assess its abatement options. This section evaluates EPA's options for implementing these responsibilities in terms of risk assessment and management, and coordination and oversight.

1. Risk Assessment and Management

Risk assessment is a two part process involving hazard assessment, or determining what degree of harm a noise source poses, and exposure assessment, or estimating the number of persons who will be exposed to harmful or annoying levels of emissions.[292] EPA has previously identified emissions levels that are harmful to health or are disruptive,[293] and its last noise survey, completed in 1981, constituted an exposure assessment.[294] Earlier it was recommended that EPA acquire up-dated exposure data.[295] It should also update its risk assessment to reflect what else has been learned about the health consequences and other effects of noise pollution since 1981.[296]

As part of its risk assessment, EPA should rank significant sources of noise according to their relative risk.[297] Since EPA is unlikely to have funding to pursue more than a few abatement projects, it is important that the agency pursue those noise sources that pose the most significant problems. A former ONAC official concedes that although the noise program had criteria to choose which noise sources required regulation, it did not attempt to rank noise sources chosen for regulation in terms of which should be regulated first.[298]

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[291] *See* supra note 271 & accompanying text (discussion of whether EPA will be more interested in noise abatement).

[292] *Cf.* Shapiro, *Biotechnology and the Design of Regulation*, 17 ECOLOGY L.Q. 1, 6-7 (1990) [cited hereinafter as "*Regulation Design*"].

[293] Levels Document, supra note 35.

[294] Bolt Beranek and Newman, Noise In America: The Extent of the Problem (July, 1981).

[295] *See* supra note 200 & accompanying text (recommending that EPA compile new exposure data).

[296] *See* Lipscomb Letter, supra note 93, at 5 (production of a "revised and updated Criteria Document should be one of the first charges to a revived ONAC program"); Maling Letter, supra note 160, at 5 (EPA should "review and rewrite 'Levels Document'").

[297] *See* SAB Report, supra note 264, at 19 (recommending that EPA should reflect "risk-based priorities" in its strategic planning process). Under the relative risk approach recommended by the SAB, *id.* at 16, EPA would also have to compare the risk reduction that could be achieved in noise abatement with its other responsibilities. Since there is no up-to-date data concerning the

Risk management involves selecting the most appropriate strategy to reduce emissions to the level required by the agency's mandate.[299] Whereas ONAC thought primarily, if not exclusively, in terms of emissions standards as a regulatory response, any new regulatory program should consider emissions standards as a last resort. Before promulgating an emissions standard, EPA should determine whether market forces, or local or state regulation, can be utilized to reduce product or transportation noise.[300] During its tenure, ONAC did not undertake the type of comprehensive assessment of risk management options recommended here.[301]

a. Market Forces

Market forces have a role to play in noise abatement, but the utility of this approach depends on whether a consumer's choice about how much noise he or she will tolerate also impacts on third parties. This section explains how EPA can expand the use of product labeling and the limitations of this approach.

The extent of noise pollution is a function of the level of consumer demand for quieter products because properly functioning markets will supply the amount of noise abatement demanded by consumers.[302] A market will not function properly, however, if product noise information is expensive to acquire.[303] EPA can lower consumer search costs by educating the public

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extent of noise risks, note 190 supra & accompanying text, it is not clear how the risks associated with noise might compare to other opportunities for risk reduction.

[298] Feith interview, supra note 50.

[299] *Regulation Design*, supra note 292, at 37.

[300] *See* SAB Report, supra note 264, at 21 (EPA should make greater use of all the tools available to reduce risk); Strategic Options, supra note 274, at 33 (same).

[301] Noise Pollution, supra note 50, at 33.

[302] *Cf.* P. Asch, Consumer Safety Regulations: Putting a Price on Life and Limb 33-35 (1988) (properly functioning markets will supply the amount of safety demanded by consumers).

[303] A rational consumer will seek information about a product until the costs of the person's search exceed the expected benefits at the margin. *Id.* at 49. When search costs are high, consumers will demand less safety than when search costs are lower. Lyndon, *Information Economics and Chemical Toxicity: Designing Laws To Produce and Use Data*, 87 MICH. L. REV. 1795, 1815 (1989). A market will also not function properly if the purchasing decisions of individual consumers affect the health of third persons. *See infra* note 318 & accompanying text (discussion of problem of spillover costs).

concerning the potential harms of noise and by promoting noise labeling. Consumers would benefit from labeling that reveals the level of noise emissions, such as labels that specify the amount of noise emitted by appliances, and from labeling that reveals the level of noise suppression, such as labels that specify the extent to which various grades of windows attenuate noise.[304]

Increased noise labeling would not necessarily require EPA regulation. As EPA educates consumers concerning the value of quieter products, some sellers will respond by providing noise information. Nevertheless, because other sellers may limit or lie about the noise information they provide,[305] regulation may be necessary to ensure adequate disclosure. EPA, however, has an important role to play even in cases of voluntary disclosure. EPA can make the voluntary disclosure of information more effective by working with an industry to promote measurement accuracy and to ensure that noise information is provided in a manner that ensures consumers can understand it and use it to compare the performance of products. Uniformity in labeling is particularly important. Consumers are unlikely to be able to use noise labels effectively if product labels for different products use different methods of disclosure.

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[304] *See* Letter from M.G. Prasad, Professor of Mechanical Engineering, Vice-President for External Affairs, Stevens Institute of Technology, to David Pritzker, ACUS (Mar. 29, 1991) (Labeling will have a "positive impact on quality and marketing of products");

Melnick Letter, supra note 198, at 1 ("Labeling products would also provide the public with information which would assist them in making purchasing judgments and serve as a mechanism for an acceptable level of awareness.")

An industry spokesman disagrees concerning the value of labeling because it would be "misleading and ineffective for the average person." Toothman Letter, supra note 94, at 2. This problem, however, could be addressed by linking consumer education programs to product labeling. Moreover, EPA should work with industry to design labeling that is understandable to the average consumer. Finally, some types of consumers, such as industrial purchasers, *see infra* note 312 & accompanying text, or environmentally-sensitive consumers, *see infra* note 313 & accompanying text, would have the sophistication and interest to understand the labeling.

[305] A seller would have an incentive to limit or skew information when its products were louder than its competitors. In this case, if disclosure were made at all, the seller has an incentive to skew the information by revealing it in a manner that makes it difficult for the firm's products to be compared to those of competitors. Beales, Craswell, & Salop, *The Efficient Regulation of Consumer Regulation*, 24 J. L. & ECON. 491 (1981); Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. *311 (1970)*, Rothschild, *Models of Market Organization with Imperfect Information: A Survey, 81 J. POL. ECON. 1283 (1973). The firm might also lie or* mislead consumers about the level of noise created by its product. EPA's experience confirms this last possibility. *See* supra note 126 & accompanying text (EPA has found that manufacturer of hearing protection equipment made false claims).

ONAC's experiences with lawn mower noise emissions illustrates the potential of the previous approach as well as some of its pitfalls. Although ONAC declared lawn mowers to be a significant noise source,[306] it agreed to postpone an emissions standard if the industry would engage in voluntary labeling.[307] The labeling program remains in effect today, but consumers have shown little interest.[308] The industry claims that this tepid response indicates that consumers understand that lawn mowers do not pose significant risks,[309] but it is also possible that consumers are not interested in the labels because the disclosure program was implemented at the same time that EPA stopped its efforts to educate consumers about the risks of noise.[310] As noted earlier, an NIH panel has found that consumers are ill-informed about the risks posed by noise.[311] Moreover, even if some consumers would ignore the labels, commercial purchasers[312] and consumers who are sensitive to environmental issues[313] would likely use such information.

Market forces can be used to abate noise emissions in other ways as well. The NCA authorizes EPA to assist other agencies in purchasing quieter products, as an inducement for their creation and manufacture.[314] The usefulness of this approach, however, is limited by the fact that it can not be used for products for which there are no EPA emissions standards.[315] A better approach would be for Congress to authorize EPA to designate low noise products for purchase by the government without the requirement that an emissions standard exist for such products.[316] EPA could also recommend to Congress and state legislatures that they establish tax or other incentives for companies to reduce noise emissions.[317]

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[306] 42 Fed. Reg. 2525 (1977).

[307] Feith interview, supra note 16.

[308] Interview with John Liskey, Director of Statistical and Technical Services, Outdoor Power Equipment Inst., in Alexandria, Va., Dec. 5, 1990.

[309] *Id.*

[310] Other industries have also found little consumer interest in purchasing quieter products. For example, there has been little consumer demand for quieter household products such as vacuum cleaners, dishwashers, and disposals. Eldred interview, supra note 59. By comparison, refrigerator manufacturers have made their product more quiet in response to consumer demands. *Id.* The difference might be explained by how consumers treat occasional versus continuous noise. *Id.* As in the case of lawn mowers, however, consumers are apparently ill-informed about the risks posed by noise, or the possibility that noise can be reduced.

[311] Note 201 supra & accompanying text. Moreover, consumers are generally unaware that consumer products like air conditions have noise ratings that could be used for purposes of comparison shopping. Feith interview, supra note 16.

[312] *See* Stewart Letter, supra note 8, at 4 (buyers of machinery in some industries "are having difficulty obtaining needed information and cooperation from machinery builders").

[313] Glaser Letter, supra note 100, at 2 ("new breed of educated consumer" who "wants to know about environmental hazards" is likely to use noise information).

[314] *See* supra Section IB3.

[315] *See* supra note 61 & accompanying text (describing legal constraints on use of program).

Although market forces have a role to play in noise abatement, not every noise problem is suitable for the previous approaches. Consumer education and labeling empowers consumers to decide for themselves what level of noise protection is appropriate, but if the consumer's choice also impacts adversely on third parties, some form of abatement regulation may be necessary.[318] The problem of lawn mower noise is again instructive. The noise from lawn mowers affects their owners, but it is also heard by others who are nearby. Unless home owners purchase quieter mowers for their own reasons, or at the behest of their neighbors, third parties will be unprotected from lawn mower noise.[319]

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[316] EPA can rely on market forces in this manner, however, even if Congress does not amend the Noise Act. One of ONAC's successes was helping communities purchase quieter products by writing model contract specifications that they could use. *See* supra note 61 & accompanying text (describing EPA's state and local buy quiet program). There are no legal constraints preventing EPA from renewing this approach.

[317] *See* Consensus Statement, supra note 96, at 18 (Incentives for manufactures to design quieter industrial and consumers goods are needed to reduce nonoccupational NIHL).

[318] Since buyers have no incentive to take into account the effect of noise on other persons when they purchase a noise-emitting product, any protection that others receive is a function of the purchaser's desire for less noise. In many cases, third parties will be exposed to loud noises because buyers have little or no interest in reducing the noise of the products they purchase. Individuals who wear hearing protection equipment while running a chain saw, for example, have no incentive to purchase a quieter product unless that option would be less expensive, which is unlikely. Also, the person who purchases a product may not hear the noise it creates. Those persons who manage the nation's railroads typically do not live next to railroad switching yards. In other cases, individuals will be present, but they may be risk takers. Individuals may purchase loud snowmobiles because they are willing to take the risk of possible hearing loss. Finally, some persons simply like noise, such as some motorcycle enthusiasts.

While persons affected by noise could reach an agreement with noise producers concerning the amount of noise they will emit in some cases, *cf.* Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960), in most cases such negotiations would be infeasible. Citizens, for example, would not be able to contract with the thousands of truck drivers who passed through their community to reduce their noise emissions. In addition, a market transaction will lead to an economically appropriate amount of pollution only if the person subject to the pollution has good information concerning its effects on human health. Schroeder & Shapiro, *Responses To Occupational Disease: The Role of Markets, Regulation, and Information*, 72 GEO L. J. 1231, 1241 (1984). Since some of the health effects of noise are not well understood, *see* supra note 191 & accompanying text (discussing health effects of noise), relying on market transactions to eliminate third party effects may also be inappropriate.

[319] These third parties will receive protection if home owners decide to seek quieter equipment to protect themselves, but home owners may not purchase quieter mowers. For example, the

Where third party effects exist, it is still possible to rely on market incentives to reduce noise. Instead of promulgating an emissions standard, Congress could authorize EPA to assess a tax on products that exceeded certain noise levels. This approach has been used with some success by some local airport operators,[320] and has received attention generally as a more efficient approach to reducing pollution.[321]

b. State and Local Regulation

Although noise-reduction regulation may be necessary in cases involving an impact on third parties, this does not mean the EPA regulation is necessary. States and local governments have at their disposal under current laws a wide range of regulatory tools--such as landplanning, noise barriers, time and place restrictions--that may not create an impediment on interstate commerce. This fact suggests that EPA should promulgate emissions standards only if local regulation will be ineffective or present a burden on interstate commerce.

The example of lawn mower noise can be used one more time. Although some persons who are informed about noise will purchase quieter lawn mowers, others will not. If the impact of the residual noise on third parties is significant, additional noise reduction will require government action. Whether local regulation will be adequate depends on the nature of the problem. If the problem is largely one of annoyance, a city could implement time and place restrictions. If, however, the noise is sufficiently loud to have significant adverse health effects, some form of emissions regulation could be necessary. Only in this last case would EPA regulation arguably be necessary to protect the public and guarantee uniform national treatment of lawn mower manufacturers.[322]

Evaluating the potential of local regulation has several advantages for EPA. First, it will save scarce EPA resources for noise problems that can not be addressed other than by federal efforts. As a related matter, EPA will be less

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home owner may decide that wearing hearing protection equipment is a less expensive option. Or the buyer may believe that lawn mower noise is sufficient to warrant purchasing a more expensive lawn mower that makes less noise. In such situations neighbors may be able to negotiate with lawn mower owners to reduce their noise exposure, but this result is more unlikely in crowded neighborhoods, where the negotiations would involve dozens of persons who both produce the noise and are subject to it.

[320] Suter, *Wendell Ford's Edsel--Or How To Delight The Lobbyists and Enrage The Citizens*, Sound & Vibration, Jan. 1991, at 5 [cited hereinafter as "*Ford's Edsel*"].

[321] *E.g.*, Sunstein, *Administrative Substance*, 1991 DUKE L.J. ___, ____ (forthcoming).

[322] An emissions standard would not necessarily eliminate the usefulness of labeling. Although the standard would establish a minimum level of protection, labeling would permit consumers to purchase machines that exceeded the minimum standard if they desired.

likely to promulgate standards, like the garbage truck regulation, that are opposed by some local noise officials, without considering the merits of this opposition.[323] Second, it invites EPA to work closely with those officials. Finally, it would permit EPA to integrate its support of an infrastructure for state and local regulation with its priority-setting process. Once EPA decided to rely on local regulatory efforts, it could then design support activities that would assist local governments in achieving the desired noise abatement.

A noise problem might also be addressed through a combination of market incentives and local control. Garbage truck noise illustrates this possibility. Many communities have the option of prohibiting garbage pickup while most residents are sleeping. Where this is not true, such as urban areas where daytime pickup is infeasible, EPA could take another tack. It could write a model contract specification that cities could use to purchase trucks that are lower in noise.

c. EPA Discretion

Although EPA should make emissions standards the regulatory tool of last resort, the NCA may prevent part of this approach. EPA has the discretion under the NCA to require labeling for noise sources whether or not they have been designated as "major" noise sources.[324] The NCA, however, appears to require EPA to regulate any product identified as a "major" noise source, even if state and local regulation might be adequate to protect the public. Under the NCA, once EPA identifies a product to be a "major" noise source, it must promulgate emissions standards within the short time deadlines specified in the act.[325] EPA, however, might avoid this result by defining "major" noise source to mean any source that requires a federal emissions standard for successful abatement or for purposes of preemption.[326] This interpretation would give EPA the flexibility to pursue noise abatement through alternative methods, while reserving the possibility that the agency would use an emissions standard if other techniques were unsuccessful.[327] If the NCA can not be interpreted in this manner, Congress should amend it to give EPA this flexibility. EPA's implementation of the NCA could also be hindered by the deadlines the NCA sets for promulgating emissions standards. ONAC missed most of these deadlines because they were unrealistically short given the size of its staff and the difficulty of writing the regulations.[328] The wisdom of statutory deadlines is the subject of considerable debate. Deadlines can improve legislative oversight,[329] enable courts to determine more easily when agency action is unreasonably delayed in violation of the Administrative Procedure Act (APA),[330] and mitigate pressures on an agency to move slowly.[331] But, as in the case of the NCA, these advantages are often lost because Congress sets unrealistically short deadlines. A better approach would be to require EPA to set its own rulemaking deadlines and then make these deadlines judicially enforceable.[332] This would permit it to set realistic deadlines,[333] while still holding it accountable.[334]

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[323] *See* supra note 112 & accompanying text (garbage truck emissions standard was opposed by local noise officials as unnecessary).

[324] 42 U.S.C. §4907(a).

[325] Note 39 supra & accompanying text.

[326] The NCA does not define what constitutes a "major" source of noise. *See* 42 U.S.C. at §§4902, 4904(b)(1). The House Report likewise contains no definition. *See* House Report, supra note 17, at 12-13. The Senate report notes that the concept of "environmental noise" refers to the "overall level of noise in a given area to which individuals are exposed, including the intensity, duration, and character of sounds from all sources." Senate Report, supra note 17, at 6. It also acknowledges that "[i]dentification as a major noise source is the first step in the development of noise emissions standards for particular products." *Id.* This last statement offers some support for the conclusion that a "major" noise source is one that requires a federal emissions standard for successful abatement.

Moreover, since Congress also authorized EPA to designate a product for labeling if it "emits a noise capable of adversely affecting the public health or welfare," *id.*, §4907(a)(1), it must have anticipated that at least some noise problems could be addressed through the use of labels. This implies that EPA was to have flexibility in choosing its approach.

If Congress did not resolve whether EPA could rely on other forms of abatement in lieu of emissions standards, EPA can write its own definition of "major" noise source as long as it is consistent with the goals and purposes of the Act. Chevron v. Natural Resources Defence Council, 467 U.S. 837 (1984). This construction would be consistent with the Act since it both results in the reduction of noise and preserves EPA's scarce resources to address problems that are intractable to other solutions (or which require federal regulation for purposes of preemption).

[327] It would not, however, justify an indefinite delay in establishing federal standards. Since the goal of the Act is noise abatement, 42 U.S.C. §4901(2), once EPA recognized that other abatement techniques were not working, it would be obligated to identify a problem as a "major" noise source and proceed to regulate it. *See* supra note 121 & accompanying text (arguing that EPA can not postpone permanently the deadlines specified in the Noise Act by de-identifying noise sources because of a lack of money to regulate).

[328] *See* supra note 49 & accompanying text (discussing why ONAC missed its deadlines).

[329] A statutory deadline provides a clear, articulable standard easily used by oversight committees at agency and budget review time. Shapiro & McGarity, supra note 29, at 54. Missed deadlines generate public concern and thereby focus congressional attention on the deadlines. *Id.* at 53 n. 292.

[330] *See* 5 U.S.C. §706(a)(1) (1988) (authorizing agencies to "compel agency action . . . unreasonably delayed").

[331] Shapiro & McGarity, supra note 29, at 56.

[332] Congress could assure further accountability by providing that agency-set deadlines could be extended only for good cause and only for congressionally determined intervals. Finally,

d. Decisionmaking Procedures

EPA should use consensus building procedures, such as advisory committees, workshops, and negotiated rulemaking, to implement the risk assessment and risk management processes recommended above. Because advisory committees can explain complex technical issues, provide peer review for tentative decisions, identify areas of consensus among scientists and engineers, and expand the participation of interested experts and affected citizens in agency decisionmaking,[335] they can improve the credibility of agency decisions, and thereby increase their acceptance.[336] This last advantage might be particularly important since EPA would be attempting to restart a program that received significant criticism from the professional community when it last operated.[337] Some of the same advantages can be obtained in a less formal and structured manner by inviting professionals, members of the regulated industry, public interest groups, and others, to participate in workshops, such as the meetings of local noise officials and noise professionals held late in ONAC's tenure.[338] Such ad hoc arrangements, however, might not be as credible as establishing a permanent advisory committee that could give continuous peer review.[339]

EPA could also use negotiated rulemaking in circumstances where the Conference has recommended that its use can be constructive.[340] EPA has used

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Congress could provide for judicial review of agency-set deadlines to prevent EPA from setting unreasonable long deadlines.

[333] The Administrative Conference suggests that the problem of unreasonable deadlines and adverse effects on agency decisionmaking can be mitigated if the agency set its own deadlines. 1 C.F.R. §305.78-3 (1990), because the deadlines reflect the agency's understanding of its own resources. *See* Shapiro & McGarity, supra note 29, at 56.

[334] If EPA implements the NCA, there is a danger that agency administrators will once again ignore the act as they did previously. While there are reasons for believing this will not happen, note 271 supra & accompanying text, this approach would protect against history repeating itself.

[335] *Cf.* Shapiro & McGarity, supra note 29, at 35.

[336] Shapiro, *Scientific Issues and the Function of Hearing Procedures: Evaluating FDA's Public Board of Inquiry*, 1986 DUKE L.J. 288, 306-07; *But see* Shapiro, *Public Accountability of Advisory Committees*, 1 RISK 189, 190-92 (1990) (describing potential of advisory committees to make administrative process less accountable). EPA has the services of a Science Advisory Board (SAB), *see* Ashford, *Advisory Committees in OSHA and EPA: Their Use In Regulatory Decisionmaking*, 9 SCI.,TECH. & HUM. VALUES 72 (1984) (describing the SAB). which advises the agency as a whole, but SAB members are unlikely to have expertise concerning noise issues.

[337] Von Gierke interview, supra note 74.

[338] Note 70 supra & accompanying text.

[339] Von Gierke interview, supra note 74.

[340] Procedures for Negotiating Proposed Regulations (Recommendation 85-5), 1 C.F.R. §305.85-5 (1990); 82-4, Procedures for Negotiating Proposed Regulations (Recommendation 82-

successfully used this procedure previously to implement its other statutory responsibilities.[341] While negotiated rulemaking works best in certain types of situations, some of the issues that might come up in future noise regulation, such as a standard creating a process for exemptions for local communities to regulate railroad yard noise,[342] appear suitable for this process.[343]

2. Coordination and Oversight Functions

EPA should also resume its coordination and oversight functions. Specifically, it should coordinate the noise abatement activities of other government agencies, facilitate private and international standard setting activities, and rethink the regulatory basis for airport noise abatement.

The importance of coordination of the federal government's noise abatement activities is difficult to judge since the extent of such activities has not been catalogued since ONAC was abolished. Nevertheless, even if the federal government's activities are fairly limited, coordination could extend limited resources by promoting the sharing of information and the elimination of duplication. The Scientific Advisory Board has recommended that EPA in general should do more to foster cooperation among government entities responsible for reducing pollution,[344] and the NIH panel concluded that "reestablishment of a federal agency coordinating committee with central responsibility for practical solutions to noise issues is essential."[345]

EPA also has a role to play concerning national and international standardization activities.[346] The Acoustical Society of America and other

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4), *id.* §305.82-4. Negotiated rulemaking is a structured discussion among all interested parties, often with the aid of a mediator or facilitator, to arrive at a consensus concerning a proposed rule. When the process is successful, an agency can promulgate the proposed rule with substantial savings in time and costs. Administrative Conference of the United States, Negotiated Rulemaking Sourcebook (1990); Harter, *Negotiating Regulations: A Case of Malaise*, 71 GEO. L.J. 1 (1982).

[341] Thomas, *The Successful Use of Regulatory Negotiation by EPA*, 13 Admin. L. News 1 (Fall, 1987), *reprinted in* Sourcebook, *supra* note 340, at 20.

[342] *See* supra note & accompanying text (discussing need for such an exemption).

[343] Procedures for Negotiating Proposed Regulations (Recommendation 82-4), 1 C.F.R. §305.82-4 (1990); *see* Harter, supra note 282, at 42-52 (listing conditions for successful negotiations).

[344] SAB Report, supra note 74, at 23; Strategic Options, supra note 274, at 43 ("Due to EPA's limited jurisdiction, cooperation with other agencies . . . often presents the best opportunities to reduce environmental risks.")

[345] Consensus Statement, supra note 201, at 18.

[346] *See* Administrative Conference of the United States, Federal Agency Interaction With Private Standard Setting Organizations in Health & Safety Regulation (Recommendation 78-4), 1 C.F.R. §305.78-4 (1990) (health and safety regulatory agencies should take advantage of private

similar professional groups have been active for many years in working with the American National Standards Institute (ANSI) to develop consensus standards concerning noise and vibration control.[347] Although ONAC has been criticized for ignoring private standardization activity,[348] there is opposition to governmental involvement in such activity,[349] except to support travel and other expenses of individuals who attend national and international standard-setting conferences.[350] These persons would like the government to support such activities and use the results, but not attempt to influence the outcome.[351]

The problem with limiting EPA's role in this manner is that the membership of most private groups interested in developing consensus standards is largely composed by representatives of noise producers, including governmental noise producers such as the Air Force and Navy.[352] If persons without a vested interest are represented at all, they are represented by a few university professors and consultants.[353] Thus, EPA's participation in such activities might bring additional balance and produce a result that the agency is more likely to be able to use. The same objective might be accomplished if EPA supported the expenses of citizens, professors, or consultants, who are not associated with noiseproducers. Whether or not EPA actively participates in private standard-setting activities, it should work with private organizations

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standard setting activities); NIOSH Strategies, supra note 206, at 57-58 (strategies to reduce noise should include promotion of national standards for noise control, hearing conservation practices, and product noise control through such organizations as American National Standards Institute and Acoustical Society of America).

[347] Timmerman Letter, supra note 258, at 3.

[348] *See* supra note 70 & accompanying text (discussing criticism of ONAC). ONAC embarked on a project to work with professional groups and other government agencies to develop common technical methods near the end of its tenure, but the project was ended when it lost its funding. *See* supra note 70 & accompanying text (discussing ONAC's efforts to work with industry to develop measurement efforts).

[349] *See, e.g.*, Kessler Letter, supra note 94, at 5 (EPA should "encourage" but not "influence" consensus noise standard activities); Maling Letter, supra note 160, at 4 (federal involvement will end up in federal "control"); Toothman Letter, supra note 94, at 2 ("Consensus standards activities are being adequately handled in this country; therefore, there is no need for federal activity.").

[350] *E.g.*, Kessler Letter, supra note 94, at 5; Timmerman Letter, supra note 258, at 3 ("only effective use for federal support" would be for travel expenses).

[351] *E.g.*, Luz Comments, supra note 100, at 3 (standards should be developed by support to ANSI).

[352] Stewart Letter, supra note 8, at 5.

[353] *Id.* Participation is limited because such individuals must usually bear their own expenses. *Id.*

to identify potential projects that would benefit both private industry and the government.

EPA regulations should be congruent with international regulatory standards if possible. This prevents domestic manufacturers from having to meet different regulatory standards in the United States and abroad. Further, it places EPA in a position to work with other regulatory authorities, such as the European Community, in adopting regulatory standards which protect the public, and yet do not serve as trade barriers.[354] ONAC previously engaged in some of these activities.[355]

The final coordination issue is what role, if any, EPA should have concerning airport noise abatement. Since ONAC was abolished, this issue has been complicated by changes in the FAA's regulatory powers. In the waning moments of the 1990 session, Congress forbade airport operators from enacting noise abatement measures concerning the newest generation of airplanes unless they have been approved by the FAA.[356] The legislation was sought by the airlines and air cargo industry because of the proliferation of local noise restrictions including evening and night-time curfews and requirements that aircraft operators pay taxes for emitting noise above specified levels.[357] Citizen groups and local elected officials, who are upset over the bill's passage,[358] have expressed an interest in having EPA superintend the FAA's implementation of its new powers.[359] The new legislation, however, does not establish any role for the EPA concerning the FAA's new powers. Nevertheless, EPA's authority under the NCA to coordinate federal noise abatement activities would arguably authorize it to participate in the FAA's implementation of its new powers.[360]

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[354] Letter from Martin Hirschorn, President, Industrial Acoustics Co, Inc., to David Pritzker, ACUS (Mar. 8, 1991) ("highly desirable" to have uniform international standards); Eversman Letter, supra note 258, at 1 (ISO standards are an "excellent" basis for establishing minimum standards for noise emissions); Hickling Letter, supra note 147, at 2 (a primary need is to reconcile noise control in United States with Europe and Japan); Luz Comments, supra note 100, at 9 (EPA should work with private standard-setting groups "to ensure that U.S. products will be competitive in the European market"); Melnick Letter, supra note 198, at 1 (federal assistance could "promote a stronger U.S. presence in the international standards community" and "facilitate" trade).

[355] *See* supra note 72 & accompanying text (discussion of EPA's attempts to harmonize domestic and international standards).

[356] Congress prohibited airport operators from adopting any airport noise or access restriction for Stage 3 aircraft unless the Secretary of Transportation finds that it meets a list of criteria specified by Congress including that the restriction does not pose an "undue burden" on interstate and foreign commerce or on the national aviation system. Aviation Noise and Capacity Act of 1990, §§9302(b), (d). A "stage 3" aircraft is one that meets the strictest of the FAA's regulations limiting aircraft noise emissions.

[357] *Ford's Edsel*, supra note 320.

[358] They assert that the sponsors of the legislation were able to sneak it through Congress during the chaos that accompanied the final days of the session. No public hearings were held, and although committee staffers consulted industry lobbyists during the bill's markup, representatives of airport operators were not consulted. *Id.* They also claim that the legislation gives the FAA unlimited discretion to strike down local noise abatement efforts. They point to

EPA can improve aircraft noise abatement, but not by attempting to supervise how the FAA implements its new powers. As the original director of ONAC points out, "It is difficult if not impossible for one federal agency to coordinate another federal agency's programs and actions."[361] EPA and FAA officials disagree concerning whether EPA oversight has increased noise abatement, but one undisputed legacy is FAA's continuing hostility concerning EPA's supervisory efforts.[362] An EPA approach to aircraft noise abatement that avoids direct confrontation with FAA is therefore more likely to be successful.

EPA has such a road open to it. FAA regulatory actions are built on scientific and policy conclusions reached by ONAC before it went out of business. As originally recommended by ONAC,[363] FAA defines areas

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the FAA's authority to veto restrictions that put an "undue burden" on interstate and foreign commerce or on the national aviation system, 1990 Act, supra note 356, §§1904(d)(2)(B), (F), because Congress did not define what it meant by "undue burden." *Congress Approves Landmark Bill Setting Framework For Noise Policy*, 2 AIRPORT NOISE REP. 171, 176 (1990). The FAA, however, has proposed criteria to be used to determine whether to approve local programs. 56 Fed. Reg. 8628 (1991).

[359] Telephone interview with Steve Kramer, President, National Organization to Insure A Sound-Controlled Environment (noise), Jan. 8, 1991; *see also* Kessler Letter, supra note 94, at 3 (EPA should be "strong advocate" for community residents impacted by aircraft noise).

[360] This authority authorizes EPA to request information from the FAA concerning the nature, scope, and results of noise-control programs, and to publish a report concerning the status of efforts by other agencies, including the FAA, to reduce noise. 42 U.S.C. §4904(c)(1), (3). EPA could use the former of these powers to require the FAA to notify it concerning applications by airport operators for approval of noise restrictions, and it could use the latter to discuss the adequacy of the FAA's response to the applications. EPA is also authorized to recommend standards to the FAA for the control of noise. 42 U.S.C. §4903(c)(2). It is not clear how this authority relates to the FAA's new powers, although it may have no connection since the FAA will implement its approval or disapproval of local noise regulations by adjudication.

[361] Meyer Letter, supra note 51, at 2.

[362] ONAC's efforts likely did nudge the FAA into being more protective, note 154 supra & accompanying text, but FAA officials deem EPA's past efforts to be largely unimportant or disruptive. Note 154 supra & accompanying text.

[363] DiPolvere Letter, supra note 94, at 2. ONAC's original work concerning the day-night noise limit (Ldn) emphasized the limitations of the metric and the potential need to supplement it in appropriate cases. Stewart Letter, *supra* note 8, at 2. After was ONAC was disbanded,

impacted by aircraft noise as areas with noise levels of 65 Ldn or greater,[364] but citizens living outside of such areas are often among the most vocal opponents of aircraft noise.[365] Critics claim these complaints reflect the fact that the FAA does not take into account the low residual sound in suburban or semi-rural areas, or the intrusive nature of single events, such as a early morning takeoffs while residents are sleeping.[366] In light of these complaints, EPA should evaluate the adequacy of current measurement methods and determine whether additional or new measures would do a better job than the Ldn 65 metric.

A reevaluation would be a useful for two reasons. First, EPA's results are more likely to be generally accepted since EPA does not share the FAA's institutional conflict of interest.[367] Second, if EPA demonstrates that the scientific and policy basis on which the FAA is proceeding is no longer valid, the FAA would presumably conform its approach to the new metric or risk having its approach overturned in court.

IV. Conclusion

The NCA is by any measure a public policy failure. In the NCA's first decade, EPA had made a reasonable start in implementing the Act, but it was a long way from finishing its noise agenda at the time ONAC was disbanded. Some emissions standards were promulgated, but fewer than the significant noise sources identified by EPA as requiring regulation. Almost no progress was made concerning labeling or purchase by the federal government of low noise products. ONAC made significant strides concerning scientific and technical research, coordination, support of local and state noise abatement, and noise education, but funding was eliminated just as the initial fruits of

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however, the 65 Ldn became an universal measure and ONAC's cautionary warnings were disregarded. *Id.*

[364] Transportation Noise, supra note 130 , at 21.

[365] *See, e.g.*, Letter from Loren Simmer, President, National Airport Watch Group, to David Pritzker, ACUS (Mar. 26, 1991) (majority of noise complaints concerning Minneapolis-St. Paul airport are outside of the 65 Ldn contour).

[366] Letter from Craig Cantoni, President, New Jersey Coalition Against Aircraft Noise, to David Pritzker, ACUS (Mar. 16, 1991), at 1-2.

[367] Letter from Charles Price, Executive Director, National Organization To Insure A Sound-Controlled Environment, to David Pritzker, ACUS (Mar. 5, 1991) (citizen group suggests EPA devise new metric); *see* Cantoni Letter, supra note 366, at 2 (citizen group complains that FAA is one of the most "blatant" examples of the Washington "revolving door"); Timmerman Letter, supra note 258, at 2 (EPA in a position to adopt "balanced approach" that weighs impacts on people against economics and efficiencies).

these labors became apparent. The second decade of the Act has been marked by almost no federal noise abatement activity, and with a marked decline in state and local activity. EPA is barely able to enforce its regulations, and fiscal limitations prevent it from updating them although several are out of date or inadequate to protect the public.

Despite this desolate picture, there has been little public outcry primarily because noise pollution lacks the type of strong, organized public constituency that fights other types of pollution, and because EPA has acquiesced in its lack of funding. In the meantime, noise pollution apparently remains at levels equal or above the last estimate in 1981, when it was significant.

The 10-year hiatus in implementing the NCA gives EPA the time and distance necessary to identify and avoid the mistakes ONAC made. Unlike previously, EPA should consider emissions standards as a last resort to be used only if market-related approaches and state and local regulation are likely to fail. This approach requires EPA to support nonregulatory activities which minimize the need for federal regulation, such as an infrastructure for local abatement and liaison with private standard-setting organizations.

The NCA's goal of a quieter country does not deserve the irresponsible treatment that Congress and the EPA gave it. EPA can redeem itself by showing how a modest program employing thoughtful public policy can improve the health and welfare of its citizens. Such a step would not only reduce noise pollution, but it would speak loudly of EPA's dedication to environmental protection.

Technical Appendix: Noise and Its Effects

Alice H. Suter, Ph.D.

I. Introduction

This report presents an overview of noise and its effects on people. Special emphasis is placed on developments over the past decade, both in terms of noise conditions and noise effects research. By doing so, this report should illustrate some of the reasons for concern about noise problems, which persist after the closing of EPA's Office of Noise Abatement and Control (ONAC).

Noise has a significant impact on the quality of life, and in that sense, it is a health problem in accordance with the World Health Organization's (WHO) definition of health. WHO's definition of health includes total physical and mental well-being, as well as the absence of disease. Along these lines, a 1971 WHO working group stated: "Noise must be recognized as a major threat to human well-being." (Suess, 1973)

The effects of noise are seldom catastrophic, and are often only transitory, but adverse effects can be cumulative with prolonged or repeated exposure. Although it often causes discomfort and sometimes pain, noise does not cause ears to bleed and noise-induced hearing loss usually takes years to develop. Noise-induced hearing loss can indeed impair the quality of life, through a reduction in the ability to hear important sounds and to communicate with family and friends. Some of the other effects of noise, such as sleep disruption, the masking of speech and television, and the inability to enjoy one's property or leisure time also impair the quality of life. In addition, noise can interfere with the teaching and learning process, disrupt the performance of certain tasks, and increase the incidence of antisocial behavior. There is also some evidence that it can adversely affect general health and well-being in the same manner as chronic stress. These effects will be discussed in more detail in the paragraphs below.

II. ONAC's Activities in Noise Effects Research and Criteria

In response to the mandates of Section 5 of the Noise Control Act of 1972, ONAC published *Public Health and Welfare Criteria for Noise* (EPA, 1973a) and *Information on Levels of Environmental Noise Requisite to Protect Public Health and Welfare with an Adequate Margin of Safety* (EPA, 1974a, popularly known as the "Levels Document" for obvious reasons). Also in 1973, ONAC sponsored an international conference in Yugoslavia on the effects of noise, from which voluminous proceedings were published (EPA, 1973b). All of these documents were widely distributed and, although somewhat dated, are still read and referenced today. Because a considerable amount of research in this area has been conducted over the past 2 decades, these documents would benefit from revision.

In these documents ONAC established dose-response relationships for noise and its effects, and identified safe levels of noise to prevent hearing loss and activity interference. The agency also established the day-night average noise level as a universal descriptor to be used in assessing the impact of community noise.

Section 14 of the Act directs ONAC to conduct or finance research on noise effects, including investigations of the psychological and physiological effects of noise on humans and the effects of noise on animals. Approximately 35 technical reports resulted from these efforts, as well as contractor reports and numerous articles in scientific journals. Some of the more noteworthy examples of EPA's research program were:

- Projects involving the cardiovascular effects of noise at the University of Miami, Johns Hopkins University and the Massachusetts Institute of Technology (Peterson, et al., 1978, 1981, 1983; Hattis and Richardson, 1980; Turkkan et al. 1983).

- A longitudinal study of noise exposure and hearing threshold levels in children conducted by the Fels Institute (Roche et al., 1977).

- An interagency agreement with the U.S. Air Force to study the effects of noise on hearing (e.g., Guignard, 1973; Johnson, 1973; Schori and McGatha, 1978; Suter, 1978).

- A study identifying the sound levels of speech communication in various environments (Pearsons, et al., 1977).

- Two studies at Northeastern University comparing methods for predicting the loudness and acceptability of noise (Scharf et al., 1977; Scharf and Hellman, 1979).

Although much useful information was derived from these programs, some of them were irreparably damaged by the abrupt termination of funding from ONAC that occurred in 1981 and 1982. For one example, the Johns Hopkins study of cardiovascular effects of noise on primates was terminated after testing on only one subject had been completed. For another, the longitudinal data from the Fels Institute is now of little value after a hiatus of more than a decade.

III. Physical Properties and Measurement of Sound

A. Physical Properties

Noise is often defined as unwanted sound. To gain a satisfactory understanding of the effects of noise, it would be useful to look briefly at the physical properties of sound.

Sound is the result of pressure changes in a medium (usually air), caused by vibration or turbulence. The amplitude of these pressure changes is stated in terms of sound level, and the rapidity with which these changes occur is the sound's frequency. Sound level is measured in decibels (abbreviated dB), and sound frequency is stated in terms of cycles per second, or nowadays, Hertz (abbreviated Hz). Sound level in decibels is a logarithmic rather than a linear measure of the change in pressure with respect to a reference pressure level. A small increase in decibels can represent a large increase in sound energy. Technically, an increase of 3 dB represents a doubling of sound energy, and an increase of 10 dB represents a tenfold increase. The ear, however, perceives a 10-dB increase as doubling of loudness.

Another important aspect is the duration of the sound, and the way it is distributed in time. *Continuous* sounds have little or no variation in time, *varying* sounds have differing maximum levels over a period of time, *intermittent* sounds are interspersed with quiet periods, and *impulsive* sounds are characterized by relatively high sound levels and very short durations.

The effects of noise are determined mainly by the duration and level of the noise, but they are also influenced by the frequency. Long-lasting, high-level sounds are the most damaging to hearing and generally the most annoying. High-frequency sounds tend to be more hazardous to hearing and more annoying than low-frequency sounds. The way sounds are distributed in time is also important, in that intermittent sounds appear to be somewhat less damaging to hearing than continuous sounds because of the ear's ability to regenerate during the intervening quiet periods. However, intermittent and impulsive sounds tend to be more annoying because of their unpredictability.

B. Instrumentation

The instrument for measuring noise is the basic sound level meter or a number of its derivatives, including noise dose meters (usually called dosimeters), integrating sound level meters, graphic level recorders, and community noise analyzers. Improvements in all of these instruments have taken place during the last decade. This is especially true of the computerized dosimeters and integrating meters, which can measure, compute, store, and display comprehensive data on the noise field (Earshen, 1986). These instruments are now able to measure over very wide dynamic ranges and to measure impulsive sounds with a high degree of accuracy.

C. Measurement and Descriptors

Most sound level meters and dosimeters use built-in frequency filters or "weighting networks" in the measurement process. By far the most frequently used filter is the A weighting network, which discriminates against low-frequency and very high-frequency sounds. A weighting approximates the equal-loudness response of the ear at moderate sound levels, and correlates well with both hearing damage and annoyance from noise. A weighting will be assumed throughout this report unless otherwise specified.

Composite measures of noise, such as the equivalent continuous sound level (L_{eq}) and the day-night average sound level (DNL) incorporate A weighting. (The mathematical notation for DNL is L_{dn}.) These levels constitute sound energy averages over given periods of time. The DNL incorporates a 10-dB nighttime penalty from 10:00 pm to 7:00 am, meaning that events occurring during that time are counted as 10 dB higher than they really are. A variant of the DNL that is used in California (and Europe) is the community noise equivalent level (CNEL), which incorporates a 5-dB penalty for evening noise events, as well as the 10-dB nighttime penalty (California Code of Regulations, 1990).

For more than a decade, both the DNL and the simple L_{eq} have been used extensively for assessing the impact of aircraft/airport noise. Recently, however, communities have expressed dissatisfaction with these metrics when used to regulate noise (Wesler, 1990). Metrics that employ averaging fail to describe the disturbance arising from single events, especially low-flying aircraft, unexpected or newly occurring flights, or flights occurring in areas where solitude is at a premium. The sound exposure level (SEL), an event's sound level normalized to one second, is gaining popularity as a supplement to the DNL and the L_{eq} for characterizing single events.

IV. Noise in America

A. Population Trends

The U.S. population has increased an average of 25 million with each census since 1950. According to the World Almanac (1991), the population in 1980 was 226 million and approximately 250 million in 1990. This reflects an increase of nearly 11 percent over the decade, or slightly more than 1 percent per year. At present, 77 percent of the U.S. population lives in the nation's 283 designated metropolitan areas, and the rate of growth in these areas is twice that of nonmetropolitan areas (Bryant, 1991).

Not surprisingly, EPA research indicates that noise levels in communities is directly related to the population density (EPA, 1974b).[1] Because the noise in urban areas generally exceeds that of suburban and rural areas, it is not unreasonable to assume that noise in the U.S. is increasing at least in proportion to the increase in urbanization and more rapidly than the growth of the general population. In addition, noise sources appear to be multiplying at a faster pace than the population.

B. Noise Sources

Figure 1, from EPA's simplified version of the Levels Document, *Protective Noise Levels*, shows the range of sound levels for some common noise sources (EPA, 1978). Most leading noise sources will fall into the following categories: road traffic, aircraft, railroads, construction, industry, noise in buildings, and consumer products.

1. Road traffic noise

In its *Levels Document* (1974), EPA estimated that road traffic noise was the leading source of community noise. EPA's contractors found this to be true in 1981 (EPA, 1981), and there is little reason to believe otherwise today.

Truck transportation, as a convenient and economical means of moving raw materials and consumer goods from place to place, is growing at a faster pace than the general population. For example, a total[2] of 33.6 million trucks were registered in the U.S. in 1980. That number grew to 45.5 million in 1989, an increase of about 35 percent (American Trucking Assoc., 1991).

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[1] The day-night average sound level appears to be proportional to the log of population density in people per square mile (EPA, 1974b).

Noise from the motors and exhaust systems of large trucks provides the major portion of highway noise impact, and provides a potential noise hazard to the driver as well[3]. In addition, noise from the interaction of tires with the roadway is generated by trucks, buses, and private autos.

In the city, the main sources of traffic noise are the motors and exhaust systems of autos, smaller trucks, buses, and motorcycles. This type of noise can be augmented by narrow streets and tall buildings, which produce a "canyon" in which traffic noise reverberates.

2. Aircraft Noise

Air traffic also appears to be increasing more rapidly than the U.S. population. In 1980, U.S. scheduled airlines flew approximately 255.2 billion passenger miles and 5.7 billion cargo (ton) miles. By 1990, these figures were 457.9 billion and 10.6 billion, respectively (Air Transport Assoc., 1991a). This represents an increase of 79 percent in passenger mileage, and 86 percent in air freight mileage. Air cargo traffic has grown particularly rapidly in the last five years, and will probably continue that trend over the next decade.

By 1989, the quieter "Stage III" airplanes comprised nearly 40 percent of the domestic fleet (Air Transport Assoc, 1991b). By the year 2004, all of the noisier Stage II aircraft must be phased out (Airport Noise and Capacity Act, 1990). This requirement should promote a quieter environment around airports, but the growth of air transportation and the pressing need for airport expansion threatens to offset the benefits of the quieter aircraft.

Nowadays, the problem of low-flying military aircraft has added a new dimension to community annoyance, as the nation seeks to improve its "nap-of-the-earth" warfare capabilities. In addition, the issue of aircraft operations over national parks, wilderness areas, and other areas previously unaffected by aircraft noise has claimed national attention over recent years (Fidell, 1990; Cantoni, 1991; Weiner, 1990; Mouat, 1990).

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[2] The total number of trucks registered includes personal-use as well as commercial trucks of all weight classes.

[3] According to Reinhart (1991) the most common complaint about truck noise is related to problems caused by tampering with the mufflers of trucks using compression brakes. About 5 percent of the heavy trucks surveyed by Reinhart and his colleagues had no functioning muffler, despite the existence of antitampering laws.

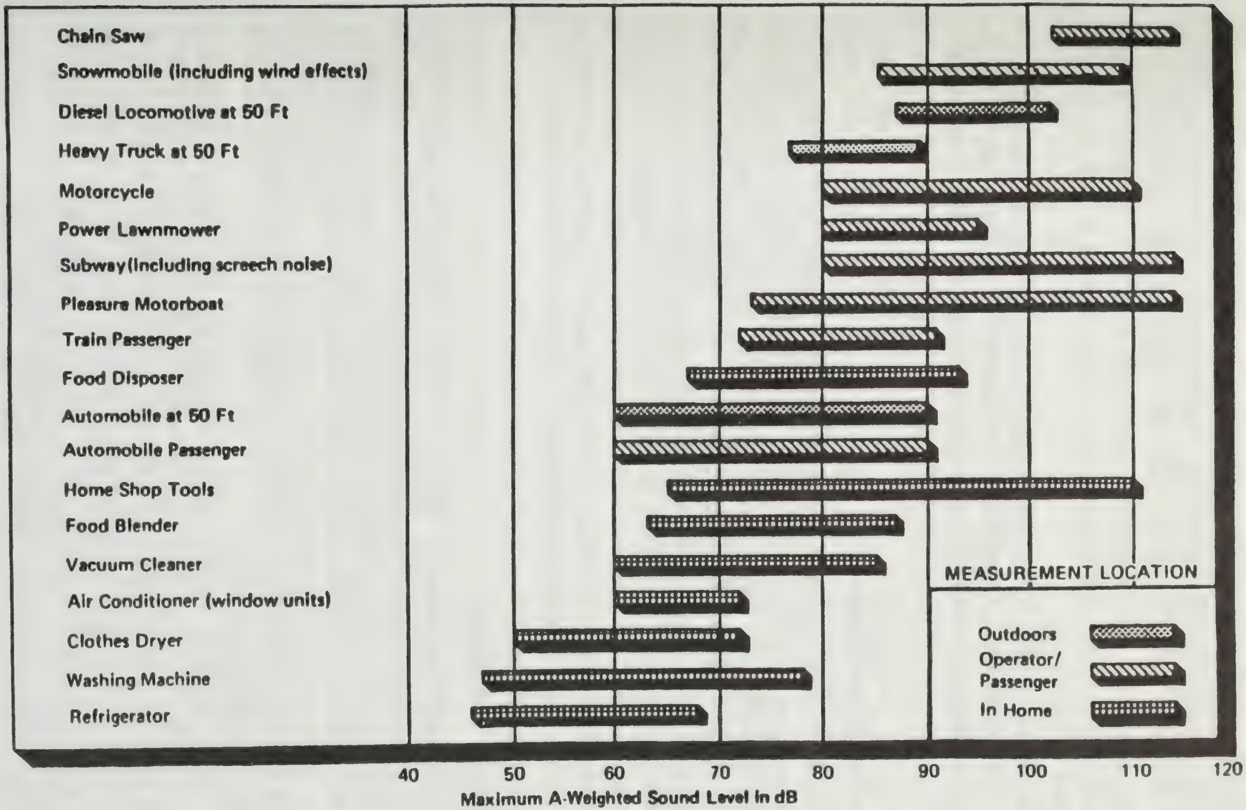

FIGURE 1. TYPICAL RANGE OF COMMON SOUNDS

From Protective Noise Levels (EPA, 1979, p.5)

3. Noise From Railroads

The noise from locomotive engines, horns and whistles, and switching and shunting operations in rail yards can impact neighboring communities and railroad workers. For example, rail car retarders can produce a high-frequency, high-level screech that can reach peak levels of 120 dB at a distance of 100 feet (EPA, 1974), which translates to levels as high as 138 or 140 dB at the railroad worker's ear.

Unlike truck and air transportation, however, rail transportation does not appear to be increasing. According to the Association of American Railroads, the railroad industry loaded 22.1 million freight cars in 1988, down slightly from 22.6 million in 1980 (AAR, 1991).

4. Construction Noise

The noise from construction of highways, city streets, and buildings is a major contributor to the urban scene. Construction noise sources include pneumatic hammers, air compressors, bull dozers, loaders, dump trucks (and their back-up signals), and pavement breakers. The construction industry has done very well over recent years with a value-added GNP of $97.9 billion in 1977, increasing to $247.7 billion in 1989 (Dept. of Commerce, 1991), an increase of about 153 percent. The number of workers employed in construction grew from 4.3 million in 1980 to about 5.2 million in 1990, an increase of nearly 21 percent (BLS, 1991a).

5. Noise in Industry

Although industrial noise is one of the less prevalent community noise problems, neighbors of noisy manufacturing plants can be disturbed by sources such as fans, motors, and compressors mounted on the outside of buildings. Interior noise can also be transmitted to the community through open windows and doors, and even through building walls. These interior noise sources have significant impacts on industrial workers, among whom noise-induced hearing loss is unfortunately common.

The size of the U.S. manufacturing industry has not grown significantly over the last decade. Although the industrial GNP increased from $673.9 billion in 1980 to $969.6 billion in 1990 (in terms of constant dollars) (BLS, 1991b), the workforce has declined from slightly more than 20 million to about 19 million during that period (BLS, 1991c). Consequently, industrially-generated community noise is probably no greater than it was in 1980.

From the worker's perspective the industrial noise problem is still very serious. The Occupational Safety and Health Administration has cut back on the enforcement of occupational noise standards and has allowed the substitution of hearing protection devices in lieu of engineering controls in many cases (OSHA, 1986). However, it is difficult to know whether noise levels in industry are increasing or decreasing because no comprehensive survey has been performed since the 1976 survey performed by Bolt Beranek and Newman Inc. (BBN, 1976).

6. Noise in Buildings

Apartment dwellers are often annoyed by noise in their homes, especially when the building is not well designed and constructed. In this case, internal building noise from plumbing, boilers, generators, air conditioners, and fans, can be audible and annoying. Improperly insulated walls and ceilings can reveal the sound of amplified music, voices, footfalls, and noisy activities from neighboring units. External noise from emergency vehicles, traffic, refuse collection, and other city noises can be a problem for urban residents, especially when windows are open or insufficiently glazed.

Wetherill (1987) reports that although the lack of soundproofing is the most frequent environmental complaint of apartment dwellers, the knowledge to solve these problems is not being applied. In fact, the quality of construction is steadily declining, and the noise problems are getting worse (Wetherill, 1991).

7. Noise from Consumer Products

Certain household equipment, such as vacuum cleaners and some kitchen appliances, have been and continue to be noisemakers, although their contribution to the daily noise dose is usually not very large. Added to this list would be yard maintenance equipment, such as lawn mowers and snow blowers, which can, at least, cause disharmony with one's neighbors, and power shop tools, which can be hazardous to hearing if used for sufficient periods of time.

One example of a fairly new product is the gasoline-powered leaf blower, with average A-weighted sound levels at the operator's position of 103.6 dB, and maximum levels of 110-112 dB (Clark, 1991). In an extensive review of nonoccupational noise exposures, Davis et al. (1985) report that the manufacturers of household devices have been reluctant to release sound level information. Consequently, it could be difficult to assess the magnitude of the problem and the extent to which noise levels are increasing or decreasing.

Residents of suburban and rural areas are sometimes disturbed by recreational noise sources, such as off-road vehicles, high-powered motor boats, and snowmobiles. Some of these sources, such as snowmobiles, are not as noisy as they were more than a decade ago, due to attention to the problem by the manufacturers and their trade associations. Others are no less noisy, and possibly more so because noise seems to be generic to the sport. Examples would be motorcycle and car racing, and events like "tractor pulls."

In fact, the allure of noisy recreational activities seems to be considerably greater now than it was a decade or so ago. The technology of sound reproduction has advanced to the point where loudspeakers can faithfully reproduce music and other sounds at levels well above 120 dB. Sporting events use giant digital "applause meters" to measure and display enthusiasm for the more popular team. The extreme in car stereo technology is now the "boom car", with sound levels exceeding 140 dB.[4] Activities like aerobic exercising and ice skating, as well as disco dancing, are accompanied by amplified music played at high sound levels. After summarizing the results of 16 studies of discotheques and rock concerts Clark (1991) reported the geometric mean of the measured sound levels as 103.4 dB. The trend in noise levels for these kinds of activities is definitely upward.

One of the most serious sources of recreational noise is sport shooting, where peak sound pressure levels at the ear can range from about 144 dB up to more than 170 dB[5] (Odess, 1972). In his analysis of this literature, Clark (1991) cites estimates of the number of people responding positively to questions about hunting or target shooting. These estimates range from 14 percent of the general population in Scandinavia and the U.K. (Axelsson et al., 1981; Davis et al., 1985) to nearly 50 percent in the Canadian workforce (Chung et al., 1981), which Clark found to be consistent with estimates from U.S. industry. In a population of rural school children, 45 out of 47 boys and 2 out of 21 girls reported having used guns (Kramer and Wood, 1982).

A subcategory of consumer product noise that deserves mention is noisy toys. A few toys, such as firecrackers, snappers, and cap pistols have been part of the adventurous child's experience for generations. The general assumption is that these toys do not pose a hazard when used occasionally and located at a sufficient distance from the ear.[6] Nowadays, there is a large variety of noisy toys, thanks to the availability of improved technology.

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[4] The International Auto Sound Challenge Association sponsors contests and gives the most points to contestants whose speakers produce the highest sound pressure levels, up to 140 dB. However, levels above that merit no more than 140 points.

[5] A-weighted levels of these weapons would measure somewhat lower, with levels for .22 caliber rifles at about 132-139 dB and shotguns at 150-165 dB. (See Clark, 1991).

[6] Certain European studies, however, have reported as many as 1 percent to 3.7 percent of teenage children suffer hearing losses caused by impulsive noise from toys (Gjaevenes, 1967; Moe, 1966). Noise from cap guns, for example, can exceed peak sound pressure levels of 140 dB (Gjaevenes, 1966; Hodge and McCommons, 1966; Marshall and Brandt, 1973; all as cited by Leroux and Laroche, 1991).

Many of them mimic adult noisemakers, such as amplified toy guitars, child-sized vacuum cleaners, and miniature power saws. Some of these toys generate quite high levels of sound. For example, a baby's squeeze toy (Fay, 1991) and the battery operated siren of a toy police car have both been measured at 110 dB.[7]

In a recent report on noisy toys, Leroux and Laroche (1991) cite studies showing A-weighted noise levels for a toy motor at 107 dB and a child's rattle at 99-100 dB (LNE, 1973). Current Canadian legislation limits the sound output of toys to "one hundred decibels measured at the distance that the product ordinarily would be from the ear of the child using it..." (Act, 1969), but Leroux and Laroche propose that this limit be lowered to an A-weighted level of 75 dB.

C. Numbers of People Exposed to Noise

The fact that people are variously exposed to noise is not surprising. Considering that decibels are measured on a logarithmic scale, however, the magnitude of these variations can be enormous. For example, the average noise level outside an urban apartment can be 1,000 times more intense than in a rural residential neighborhood. Fortunately, this difference will be perceived more like an eight-fold rather than a thousand-fold increase. Figure 2, from EPA's document *Protective Noise Levels*, shows examples of outdoor day-night average sound levels measured at various locations (EPA, 1978).

In 1974, EPA estimated that nearly 100 million Americans lived in areas where the daily average noise levels exceeded its identified safe DNL of 55 dB (EPA, 1974a). Figure 3, from EPA's *Levels Document*, shows the residential noise environment of the U.S. population as a function of the exterior DNL, with separate curves for the freeway and aircraft increments.

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[7] New York audiologist Thomas Fay has measured the noise levels of a variety of children's toys. In doing so he places the sound level meter's microphone quite close to the noise source (from 2 inches to 1/2 inch away), based on his observations of the children at play. (Personal communication, April 1991).

Figure 2

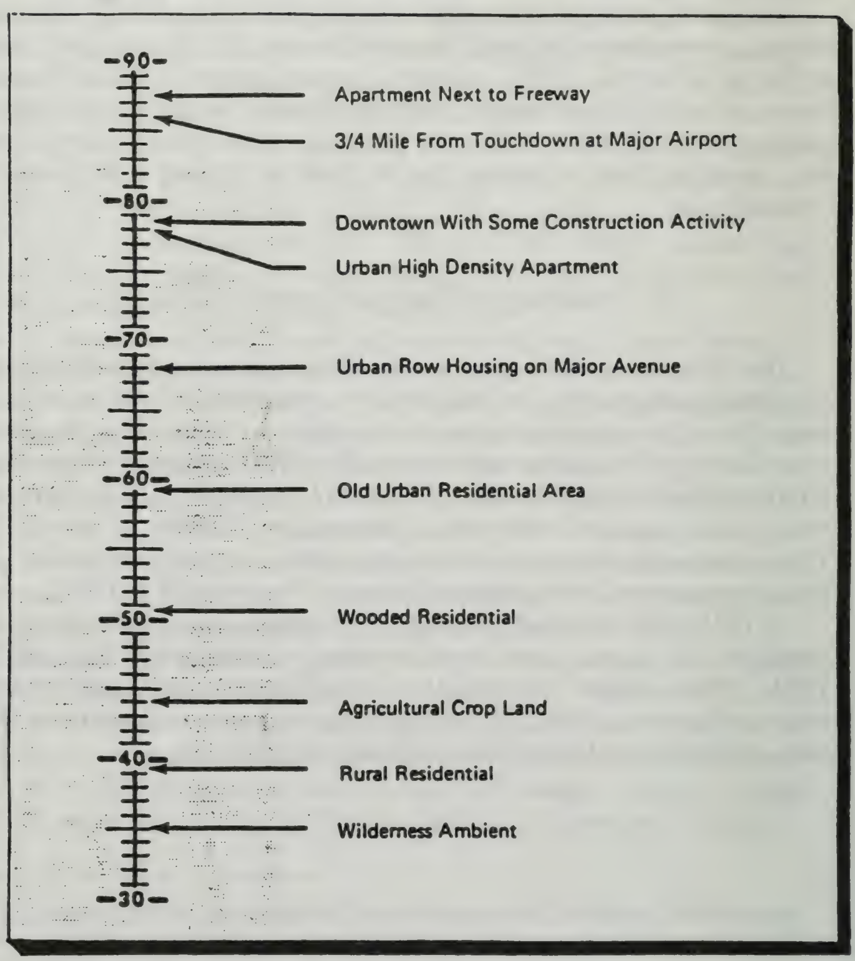

FIGURE 2 EXAMPLES OF OUTDOOR DAY-NIGHT AVERAGE SOUND LEVELS IN dB MEASURED AT VARIOUS LOCATIONS

From Protective Noise Levels (EPA, 1979, p.8)

A few years later EPA contracted with the consulting firm Bolt Beranek and Newman (BBN) to develop more detailed estimates. The resulting report, *Noise in America*, includes a breakdown according to noise exposure source (EPA, 1981). Table I gives the estimated number of Americans exposed to traffic, aircraft, construction, rail, and industrial noise for various DNLs from 55 dB to 80 dB. The authors note that there will be some overlap among populations exposed to different sources, so the numbers across categories are not additive. The far right column represents the total estimated number of people exposed to the combined sources. Although the authors do not give an estimate for the number of people exposed above L_{dn} 55 dB, another authority puts it at 138 million at that time (Eldred, 1990).

These estimates do not represent the results of a national survey. Instead, the authors used data and models available to EPA and BBN at the time. Because of this, some categories of noise exposure are likely to be more accurate than others. They did, however, represent the best available estimates at the time, and because no efforts have been made to update them, they are the best estimates available today.

D. Summary: Noise in America

It is safe to assume that noise in communities is increasing. Noise levels are directly related to population density, and the urban population is increasing at twice the pace of the nonurban population. In addition, the last decade has seen rapid growth in air transportation, trucking, and the construction industries, indicating that noise levels from these sources has most likely increased. The fact that some of these sources have been and continue to be quieted (especially new generations of trucks and aircraft) should mitigate this increase, but the extent of this mitigation will remain unknown until some sort of national survey is performed. Noise from construction continues to be a problem, and it appears that noise inside buildings as well as noise from recreational activities and consumer products is on the rise. Estimates of the number of people exposed to noise at various levels are now somewhat outdated.

Figure 3

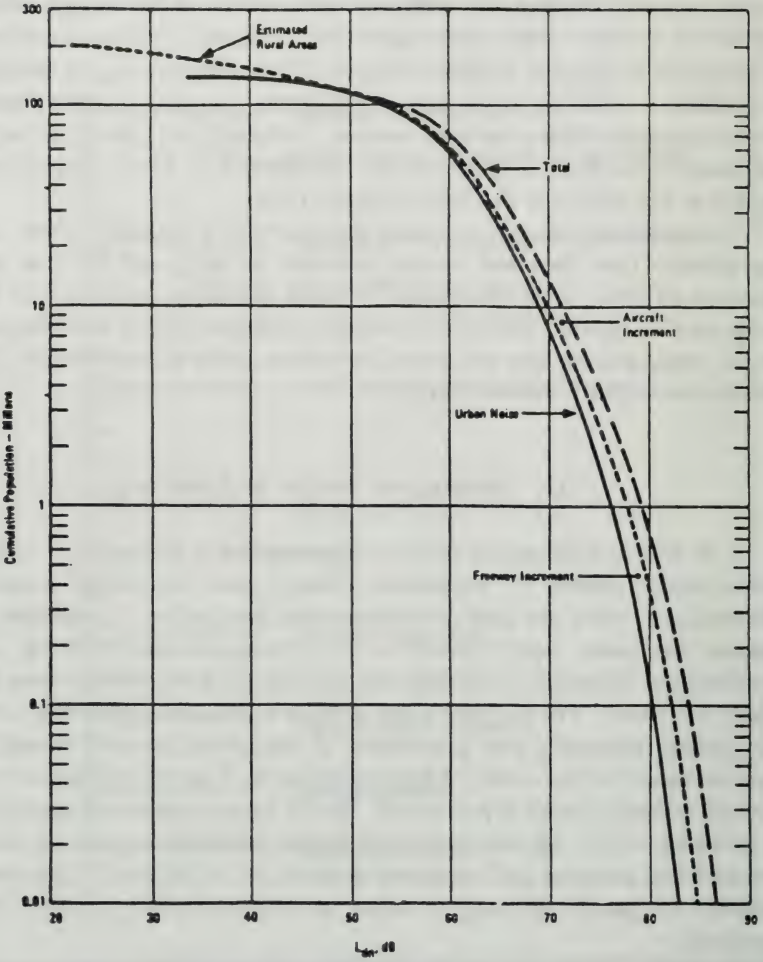

Figure 3. Residential Noise Environment of the National Population As a Function of Exterior Day-Night Average Sound Level^{B-5}

From Information on Levels of Environmental Noise Requisite to Protect Public Health and Welfare with an Adequate Margin of Safety (EPA, 1974a, p.16)

Table 1

Table 1. Summary of U.S. Population Exposed to Various Day-Night Average Sound Levels[1] (or higher) From Noise Sources in the Community.[2] From Noise in America (EPA, 1981, pp. 10 and 15).

Estimated Number (In Millions) of People In Each Noise Category

DNL (dB)	Traffic	Aircraft	Construction[3]	Rail	Industrial	Total
> 80	0.1	0.1	—·—	—·—	—·—	0.2
> 75	1.1	0.3	0.1	—·—	—·—	1.5
> 70	5.7	1.3	0.6	0.8	—·—	8.1
> 65	19.3	4.7	2.1	2.5	0.3	27.8
> 60	46.6	11.5	7.7	3.5	1.9	63.6
> 55	96.8	24.3	27.5	6.0	6.9	92.4*

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[1] DNL values are yearly averages, outdoors

[2] Note that there is some overlap among populations exposed to different noise sources. For example, some of the 96.8 million people exposed to Ldn 55 dB and above from traffic noise are also exposed to aircraft noise.

[3] Construction estimates include both residential and nonresidential exposure.

* Distribution of total exposed to all sources starts at Ldn 58 dB since the analysis involves combining distributions exposed to 55 dB and above.

V. Effects of Noise

A. Noise-Induced Hearing Loss

Hearing loss is one of the most obvious and easily quantified effects of excessive exposure to noise. Its progression, however, is insidious, in that it usually develops slowly over a long period of time, and the impairment can reach the handicapping stage before an individual is aware of what has happened. While the losses are temporary at first, they become permanent after continued exposure, and there is no medical treatment to counteract the effect. When combined with presbycusis, hearing loss naturally occurring with the aging process, the result is a premature impairment that grows inexorably with age.

According to the U.S. Public Health Service (PHS, 1991), some 10 million of the estimated 21 million Americans with hearing impairments owe their losses to noise exposure (as cited in Carney, 1991). The study goes on to say that it is unclear whether the incidence of hearing impairment has risen in recent years because the necessary studies have not been conducted.

1. Extent of Noise-Induced Hearing Loss from Environmental Sources

Although the major cause of noise-induced hearing loss is occupational, substantial damage can be caused by nonoccupational sources. In addition to the frequently-blamed sources of loud music and shooting, noise-induced hearing loss has been noted in the children of farm families, presumably from the frequent use of tractors (e.g., Broste et al., 1979); general aviation pilots because of the high noise levels emitted by piston aircraft (Anon., 1982); and users of earlier generations of cordless telephones because of the placement of the ring mechanism in the earpiece (Orchik et al., 1985 and 1987).

The prevailing notion among parents is that the hearing threshold levels of children are worse than they used to be because of exposure to loud music. Actually, a recent national survey of 38,000 school children found *better* hearing threshold levels than 30 years ago, but blames the discrepancies on the sampling methods used in the earlier study and the conversion from an older to a newer zero reference level (Lundeen, 1991). There is, however, evidence that the hearing of some young people is being affected by noisy leisure time activities (Axelsson et al., 1987).

Loud music in particular appears to be the cause of hearing impairment and tinnitus in rock musicians. Such luminaries as Pete Townshend and Ted

Nugent[8] have acquired substantial hearing losses and are now campaigning for hearing conservation (Murphy, 1989). Some studies point to a hearing hazard for attendees as well (see in Clark, 1991; Clark and Bohne, 1986; Danenberg et al., 1987).

As mentioned above, probably the greatest nonoccupational hazard to hearing comes from sport shooting. Clark (1991) cites studies of industrial workers by Chung et al. (1981), Johnson and Riffle (1982), and Prosser et al. (1988), showing significantly greater hearing losses among sport-shooters than among their nonshooting counterparts. These losses are almost always characterized by worse hearing in the left ear than the right.

The contribution from nonoccupational sources is called "sociocusis" (a contraction of "socioacusis"). Evidence from primitive societies suggests that the absence of sociocusis explains the large differences in hearing threshold level between these populations and those of the "civilized" nations (Rosen, 1962). Sociocusis, occupational hearing loss, and presbycusis contribute in various proportion to an individual's total hearing impairment. While the contribution of each source may be less than significant, the combination of all three can be enough to produce a handicapping condition. As longevity in the U.S. population increases, the toll of noise-induced hearing loss will become increasingly evident (Carney, 1991).

2. The Handicap of Noise-Induced Hearing Loss

Vowel sounds tend to be low in frequency and high in sound energy, while the consonants are much higher in frequency and have considerably less amplitude. It also happens that consonants provide the primary intelligibility to speech. Because noise damages the ear's ability to perceive high-frequency sounds much earlier and more severely than the low-frequency sounds, individuals with noise-induced hearing loss are at a particular disadvantage in understanding speech.

Individuals with early noise-induced hearing loss often think that other people no longer speak clearly. They soon begin to notice that they have difficulty understanding speech when there is noise in the background, and in groups of people, and that it is hard to identify which person is talking. As the hearing loss progresses, these individuals avoid social occasions and situations where they must listen at a distance, like church and theater. The eventual result can be loneliness and isolation.

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[8] According to Nugent, who has worn an earplug in his right ear since 1967: "My left ear is there just to balance my face, because it doesn't work at all." (Murphy, 1989)

3. The Study of Noise-Induced Hearing Loss

Noise damages the delicate sensory cells of the inner ear, the cochlea. This process can be studied in the laboratory by inducing temporary shifts in hearing threshold level in humans. Over recent years the preferred method of investigation is to produce temporary and permanent threshold shifts in animals, and to study the resulting physiological and anatomical changes in the cochlea, as well as shifts in hearing threshold level. The laboratory allows for strict control of noise level and duration, but the durations are usually relatively short because of the time and expense involved. Also there is some controversy over the extent to which the results can be generalized to humans.

Much of the recent laboratory effort in noise research has focused on the structural and functional basis of noise-induced hearing loss, which has been greatly aided by the electron microscope. Investigators have identified the sensory cell's stereocilia and the rootlets which anchor them as the auditory system's most vulnerable components with respect to noise exposure (Liberman, 1990).

Field studies of noise-exposed workers avoid the problems of species generalization, and the exposure durations can be over many decades. They are usually cross-sectional studies, however, meaning that the current hearing threshold levels are related to noise exposures that have been experienced over many years. Although the current noise measurements may be valid, their validity over prior years usually has to be assumed without benefit of precise data.

4. Risk of Hearing Impairment from Continuous Noise

The methods and results of the major field studies of continuous noise exposure conducted in the late 1960s and early 1970s remain unchallenged. Examples are the studies of Burns and Robinson (1970), Baughn (1973), Passchier-Vermeer (1968), and the U.S. National Institute for Occupational Safety and Health (NIOSH, 1973). Data from these studies have been used by various organizations to estimate the risk of hearing impairment over a working lifetime of exposure to noise. These types of studies have also been used by the EPA to estimate the hazard of nonoccupational noise (Guignard, 1973; Johnson, 1973; EPA, 1973a). The data cited above of Burns and Robinson, Baughn, and Passchier-Vermeer went into EPA's identification of a yearly average exposure level of 70 dB as the safe level, which could be experienced over a lifetime (EPA, 1974a).[9]

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[9] The 70-dB 24-hour average sound level can be interpreted as a 75-dB 8-hour average sound level plus an average sound level during the other 16 hours of less than 60 dB (see EPA's *Levels Document*, p.29, footnote d).

A new international standard (ISO, 1989), which is based mainly on the data of Passchier-Vermeer and Burns and Robinson, contains formulas for assessing the risk of noise-induced hearing impairment and handicap using either a highly screened (for nonoccupational hearing loss) or an unscreened population as a control group. The data and analyses found in these major studies have not been seriously challenged, and remain in use today.

5. Varying and Intermittent Noise

There has been some debate over the best rule for combining noise level and duration to assess the damaging effects of noise, especially varying and intermittent noise. This relationship is often called the doubling rate, or nowadays, the exchange rate. The EPA, as well as most other federal agencies (and most European countries, the United Kingdom, some Canadian provinces) use the equal-energy rule, which incorporates a 3-dB exchange rate. OSHA uses the 5-dB exchange rate, and the U.S. Air Force, uses 4 dB. None of these rules makes any provisions for the temporal order of sounds, although the 5-dB exchange rate supposedly represents a simplification of criteria that take a certain number of intermittencies into account.[10]

Investigations of the relationship between noise level and duration have been conducted over recent years using laboratory animals. The results have confirmed the validity of the equal energy (3-dB) rule for single exposures to continuous noise (Bohne and Pearse, 1982; Ward and Turner, 1982), or when the exposures are broken up into 8-hour, or even 1-hour "workdays", 5 days per week, so long as the sound energy is equivalent (Ward, 1983). There is, however, some benefit to intermittent quiet periods (Ward and Turner, 1982), during which the ear can recover from small, temporary hearing losses. For this reason EPA has adjusted its identified safe level upward by 5 dB[11] since most environmental noise exposures are intermittent in nature. EPA's use of the equal-energy rule and the 5-dB adjustment have not been seriously challenged.

6. Impulse Noise

The effects of impulse noise have been studied extensively over recent years, but there is less agreement on this topic than there is for continuous and intermittent noise. Although there was consensus favoring the 3-dB rule at a 1981 international meeting in England (von Gierke et al., 1981), actual dose-response relationships are still elusive. The effects of impulse noise do not always follow the 3-dB rule, in that temporal pattern, waveform, and rise time can affect the growth of hearing loss, despite constancy of sound energy (Henderson and Hamernik, 1986).

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[10] The 5-dB rule does not necessarily provide for intermittencies because it allows uninterrupted exposures to continuous noise at high levels. See Suter, 1983.

[11] The identified safe level of 70 dB reflects the incorporation of the 5-dB adjustment.

Frequency also has some bearing on the damage caused by impulse noise, in that low-frequency impulses produce significantly less damage than sounds in the mid-to-high-frequency range (Price, 1983). The ear appears to be most susceptible to impulses with peaks around 4,000 Hz (Price, 1989). Also, there may be a critical level, above which the ear is considerably more at risk because of a change in the response mechanism. On the basis of his research, Price (1981) has suggested a critical level of 145 dB, with a standard deviation of 8 dB.

7. Susceptibility

Evidence from field studies indicates that men incur more hearing loss than women from comparable noise exposures (Burns and Robinson, 1970; Berger et al., 1978; Royster et al., 1980), and that Caucasians appear to be more susceptible than Blacks to noise-induced hearing loss (Royster et al., 1980). Other factors, such as age, preexposure hearing threshold level, general health, and use of alcohol, have not yet proved to be reliable predictors of susceptibility (Ward, 1986), although there is some indication that the use of tobacco may increase susceptibility to noise-induced hearing loss (Barone, et al., 1987; Stark, et al., 1988).

8. Interactions with other Agents

Noise can interact with drugs and industrial agents to produce additive or even synergistic effects on hearing. As expected, the higher the levels of noise and the greater the dose of the other agent, the greater will be the resulting hearing loss. The ototoxic properties of certain drugs, most notably the aminoglycoside antibiotics (the "mycin" drugs), are heightened by exposure to noise. Numerous studies of kanamycin plus noise exposure have revealed additive and some synergistic results (Humes, 1984). High doses of salicylates (aspirin) accompanied by noise exposure can produce temporary hearing losses (McFadden and Plattsmier, 1983), but permanent losses do not seem to occur. Cisplatin, used in cancer chemotherapy, is known to be toxic to the auditory system, and has been shown to interact significantly with noise exposure (Boettcher et al., 1989).

A variety of industrial agents, which can be potent neurotoxins, have been shown to be capable of producing hearing loss (Fechter, 1989). These agents include heavy metals, such as lead and mercury, organic solvents, such as toluene, xylene, and carbon disulfide, and an asphyxiant, carbon monoxide.

9. Hearing Protectors

As its first (and only) labeling regulation, EPA promulgated a regulation for labeling the attenuation of hearing protection devices (EPA, 1979). The standard required manufacturers to subject their hearing protectors to specific laboratory tests, and to publish a "Noise Reduction Rating" (NRR) on the product's package. The NRR was subsequently adopted by OSHA in its hearing conservation amendment, which required employers to use it in assessing the adequacy of hearing protectors for given noise environments (OSHA, 1981 and 1983). Recent research shows that the NRR greatly overestimates the noise reduction to be achieved by these devices in actual field use.[12] These kinds of findings have led to the formation of a new ANSI working group to investigate alternatives to the current NRR (Berger et al. 1990), and the recommendation that EPA revise its existing labeling regulation (Berger, 1991; Stewart, 1991).

10. Summary: Noise-Induced Hearing Loss

Noise-induced hearing loss is probably the most well-defined of the effects of noise. Predictions of hearing loss from various levels of continuous and varying noise have been extensively researched and are no longer controversial. Some discussion still remains on the extent to which intermittencies ameliorate the adverse effects on hearing and the exact nature of dose-response relationships from impulse noise. It appears that some members of the population are somewhat more susceptible to noise-induced hearing loss than others, and there is a growing body of evidence that certain drugs and chemicals can enhance the auditory hazard from noise.

Although the incidence of noise-induced hearing loss from industrial populations is more extensively documented, there is growing evidence of hearing loss from leisure time activities, especially from sport shooting, but also from loud music, noisy toys, and other manifestations of our "civilized" society. Because of the increase in exposure to recreational noise, the hazard from these sources needs to be more thoroughly evaluated. Finally, the recent evidence that hearing protective devices do not perform in actual use the way laboratory tests would imply, lends support to the need for reevaluating current methods of assessing hearing protector attenuation.

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[12] In a summary of 10 studies, Berger (1983) shows that most hearing protectors in the field provide only one-third to one-half the attenuation that they do in the laboratory.

B. Interference With Communication

Noise can mask important sounds and disrupt communication between individuals in a variety of settings. This process can cause anything from a slight irritation to a serious safety hazard involving an accident or even a fatality because of the failure to hear the warning sounds of imminent danger. Such warning sounds can include the approach of a rapidly moving motor vehicle, or the sound of malfunctioning machinery. For example, *Aviation Safety* (Anon., 1982), states that hundreds of accident reports have many "say again" exchanges between pilots and controllers, although neither side reports anything wrong with the radios.

Noise can disrupt face-to-face and telephone conversation, and the enjoyment of radio and television in the home. It can also disrupt effective communication between teachers and pupils in schools, and can cause fatigue and vocal strain in those who need to communicate in spite of the noise. Interference with communication has proved to be one of the most important components of noise-related annoyance (EPA, 1974a).

In its *Levels Document*, EPA determined that a yearly average day-night sound level of 45 dB would permit adequate speech communication in the home, and a DNL of 55 dB would permit normal communication outdoors at a distance of about 3 meters.[13] These levels also apply to hospitals and educational facilities. Higher average noise levels would be satisfactory for certain nonresidential spaces, such as commercial and industrial facilities, and inside transportation, depending on the degree to which speech communication is critical. Research over the last 20 years has expanded and refined EPA's criteria development in this area, but has not generated any major changes.

1. Prediction of Speech Interference

Methods of predicting the amount of speech that can be communicated in various noise backgrounds have been available for decades. Probably the most popular and respected method is the articulation index (AI) (French and Steinberg, 1947), which requires the measurement or estimation of the spectrum level of both speech and noise in 20 contiguous bands. Over the past 2 decades investigators have suggested adjustments to the AI for 1/3-octave bands, reverberation time, various vocal efforts, etc., and more recently for various degrees of hearing impairment (Humes, et al., 1986 and 1987).

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[13] These levels represent EPA's identification of safe levels of environmental noise to protect the public health and welfare against all adverse effects of noise with the exception of hearing loss.

The speech interference level (SIL) (Beranek, 1954) provides a quick method for estimating the distance at which communication can occur for different levels of vocal effort. The current method involves measuring octave-band sound pressure levels at 500, 1,000, 2,000, and 4,000 Hz and referring to a chart to determine the potential communication distance. The basic chart has been expanded to include such parameters as a broader range of voice levels and provisions for room reverberation (Webster, 1983). Additions to both the AI and the SIL have been proposed by Lazarus (1990), who offers modifications and extensions to account for strain on the part of both talker and listener, and the wearing of hearing protectors.

Another popular method to predict speech communication in a variety of conditions, the speech transmission index (STI), has been developed by a Netherlands research group (Houtgast, 1980; Houtgast and Steeneken, 1983). The STI takes into account room volume and reverberation time, in addition to speech and noise levels, and distance between talker and listener. A more recent outgrowth, the rapid speech transmission index (RASTI), represents a simplified version of the STI intended for field use, and is available in an instrument conforming to an international standard (IEC, 1987).

Finally the sound level meter's A-weighting network can be successfully used to predict speech interference levels. It is easy to use, available on virtually all sound level meters, and effective when the noise spectra are not complex.

2. Criteria for Speech and Warning Signals

In addition to the classic work of Beranek and his colleagues (Beranek et al., 1971), Beranek has recently refined the traditional curves to account for the annoyance due to low-frequency "rumble" (Beranek, 1989). New criteria for determining acceptable background levels of noise in rooms are also offered by Lazarus (1986a, 1986b, 1987, and 1990). Lazarus includes in his criteria a variety of parameters such as: type of room, type of communication, communication distance, vocal effort, quality of speech intelligibility, AI, communication strain, listener's hearing sensitivity, and the use of hearing protectors.

Guidelines for audible warning signals have been developed by Patterson (1982). These guidelines, which were originally created for civil aircraft, were later adapted to helicopters and even stationary workplaces like hospitals (Patterson, 1985; Rood et al., 1985). Another set of guidelines for acoustic warning signals has been developed by Lazarus and Hoge (1986), and is based on the compatibility of signal type with various desired or undesired situations.

Although criteria have not yet been developed for speech recognition involving nonnative listeners, experiments by Florentine (1985) and Nabelek

(1983) indicate that these individuals need more favorable listening conditions (less background noise and reverberation) than their native-language counterparts. These findings have implications for air traffic control systems.

3. The Effect of Hearing Protectors on Speech and Warning Signal Perception

Hearing protectors attenuate both noise and the desired signal by equal amounts in a given frequency band, reducing both to levels where the ear is less likely to distort. This process often improves speech recognition when the level of background noise exceeds 80 to 90 dB. However, because hearing protectors usually provide considerably more attenuation in the high frequencies than in the low frequencies, listeners who have high-frequency hearing losses are at a disadvantage. Many speech sounds and some warning signals will be attenuated beyond the range of audibility. This is especially true of individuals whose losses exceed an average of 30 dB at the audiometric frequencies 2,000, 3,000, and 4,000 Hz (Lindeman, 1976). A potential solution for this problem lies in some newly developed hearing protectors with flat attenuation across the frequency spectrum (Allen and Berger, 1990; Killion et al., 1988). One type of these protectors has already become popular with orchestral musicians (Killion et al., 1988) and even some rock musicians (Cohen, 1990).

Individuals tend to speak more softly when they wear hearing protectors, and consequently, speech communication is degraded when both talker and listener wear these devices (Hoermann et al., 1984). Hearing protectors also interfere with the localization of sounds in space, and this is especially true of the ability to localize sounds in the vertical plane while wearing ear muffs (Noble, 1981). Both ear plugs and ear muffs cause these types of problems, but it appears that they are more pronounced with ear muffs (Howell and Martin, 1975; Abel et al., 1982). These findings can have serious implications for safety in some circumstances.

4. Scholastic Performance

Noise can disrupt communication in the classroom to the extent that the instructional method used in schools close to airports is sometimes nicknamed "jet pause" teaching. Cohen and Weinstein (1981) have reviewed several studies, which, after controlling for socioeconomic factors, indicate that the academic performance of children in quiet schools is better than that of children in noisy schools.

For example, elementary school children on the side of a school facing train tracks performed more poorly on a reading achievement test than children in classrooms on the quiet side of the school (Bronzaft and McCarthy, 1975).[14] Cohen and Weinstein also discuss research showing that skills, such as auditory discrimination and reading achievement can be adversely affected when children *live* in noisy circumstances, even though their schools may be no noisier than average. These latter studies indicate that interference with communication in the classroom is not the only process at work here. Possible additional explanations include adverse effects on children's information processing strategies and their feelings of personal control[15] (Cohen and Weinstein, 1981).

5. Summary: Interference with Communication

Interference with speech communication and other sounds is one of the most salient components of noise-induced annoyance. The resulting disruption can constitute anything from an annoyance to a serious safety hazard, depending on the circumstance.

Research over the past 2 decades has expanded and refined methods for predicting communication interference, but has not produced any major changes. Numerous adjustments have been suggested for the AI, the SIL has been modified and refined, and a new predictive method, the STI has been added. Criteria for determining acceptable background levels in rooms have also been expanded and refined, and progress has been made on the development of effective acoustic warning signals.

It is now clear that hearing protection devices can interfere with the perception of speech and warning signals, especially when the listener is hearing impaired, both talker and listener wear the devices, and when wearers attempt to localize a signal's source.

Noise can interfere with the educational process, and the result has been dubbed "jet-pause teaching" around some of the nation's noisier airports, but railroad and traffic noise can also produce scholastic decrements.

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[14] Bronzaft reported that in 1978 the city of New York reduced the noise of the elevated train and installed acoustical insulation in the affected classrooms, providing a total reduction in the A-weighted noise level of 6 to 8 dB (Bronzaft, 1981). By 1981, there were essentially no differences in reading achievement between students on the two sides of the school for the classrooms studied.

[15] See also the discussion of noise, performance, and behavior in sections D.4. and D.5. below.

C. Effects of Noise on Sleep

Noise is one of the most common forms of sleep disturbance, and sleep disturbance is a critical component of noise-related annoyance. A study used by EPA in preparing the *Levels Document* showed that sleep interference was the most frequently cited activity disrupted by surface vehicle noise (BBN, 1971). Aircraft noise can also cause sleep disruption, especially in recent years with the escalation of nighttime operations by the air cargo industry. When sleep disruption becomes chronic, its adverse effects on health and well-being are well-known.

1. Assessing Sleep Disturbance

Noise can cause the sleeper to awaken repeatedly and to report poor sleep quality the next day, but noise can also produce reactions of which the individual is unaware. These reactions include changes from heavier to lighter stages of sleep, reductions in "rapid eye movement" (REM) sleep, increases in body movements during the night, changes in cardiovascular responses, and mood changes and performance decrements the next day. The accuracy and efficiency with which these effects are measured has been greatly assisted by the use of contemporary computers. The most popular measurement tool nowadays is electro-encephalography, but other methods, such as electrocardiography, electromyography, and electrooculography are also used, as well as clinical observation, self-assessment surveys, and accelerometry to measure the motion of the bed frame.

As a result of many years of research on the effects of noise on sleep, it is clear that intermittent and impulsive noise is more disturbing than continuous noise of equivalent energy, and that meaningful sounds are more likely to produce sleep disruption than sounds with neutral content. Also, older people are more likely to have their sleep disturbed by noise than younger people. In fact, children appear to be about 10 dB less sensitive to noise-induced sleep disruption than adults (Eberhardt, 1990). Sleep disturbance from noise tends to be greater in the early hours of the morning, when individuals spend more time in lighter sleep stages, and this is particularly true of the elderly.

2. Criteria for Sleep Interference

In the *Levels Document*, EPA identified an indoor DNL of 45 dB, which translates to a nighttime average sound level of 35 dB, as necessary to protect against sleep interference. However, consensus on the levels of noise that can be tolerated without sleep disruption is incomplete at this time. In an attempt to develop a quantitative model for predicting noise-induced sleep interference, Pearsons et al., (1989) reviewed and analyzed 21 studies. However, the authors were unable to derive dose-response relationships from these studies because of large discrepancies between studies conducted in the laboratory and those conducted in the field.

In a recent review of the noise and sleep research, Griefahn (1990) recommends that the nighttime average sound level be kept below 45 dB in the sleeper's quarters. She cites research by Eberhardt (1987 and 1990; Eberhardt et al., 1987;) and Vallet et al., (1976 and 1990) showing self-reported adverse effects from continual road traffic when the average sound level is 40 dB and physiological responses at an average level of 37 dB. For intermittent road traffic noise, maximum recommended levels for single events (as opposed to average levels) range from 45 to 68 dB, depending on the investigation (Griefahn, 1990). Vallet et al. (1990), recommend maximum outside levels of 65 dB, which, of course, relies on some attenuation by the residence. Griefahn also points out that higher maximum levels can be tolerated if the ambient noise level is not very low, and that the difference between single events and the ambient level should not exceed 8 to 10 dB.

3. After-Effects and Habituation

Numerous recent investigations have revealed after-effects due to noisy nights. Ohrstrom (1983) found mood changes on the day following nights when the average sound level was as low as 35 dB. Adverse effects on performance, such as increased reaction time, have also been measured (Jurriens et al., 1983), and it appears that older peoples' next day performance is more adversely affected by noise than that of younger people (Griefahn and Gros, 1983).

Although people often believe they get used to nighttime noise, physiological tests point to the contrary. Studies have shown that while the subjective response improves with time, cardiovascular responses remain unchanged (Muzet, 1983). Vallet et al. (1990) conclude that habituation is not complete, even after 5 years of exposure to noise.

4. Summary: Effects of Noise on Sleep

Noise-induced sleep interference is one of the critical components of community annoyance. It can produce short-term adverse effects, such as mood changes and decrements in task performance the next day, with the possibility of more serious effects on health and well-being if it continues over long periods.

EPA's identified indoor DNL of 45 dB has not been seriously challenged over the past decade, but consensus in this area is lacking. One problem is that different experimenters tend to use a variety of descriptors (DNL, L_{eq}, and maximum single-event levels) and a variety of methods for evaluating the effects (EEG, EKG, self-report, etc.). Perhaps one reason for the lack of clear-cut criteria is that this is a complex area to research, requiring considerable time and expense. Another is, of course, a need for more field studies in this area.

D. Effects on Performance and Behavior

EPA did not use the literature on the effects of noise on performance and behavior in the identification of its levels of noise to protect against activity interference. One reason may have been that much of the information at that time related to the occupational setting rather than the general environment. Another may have been the complexity of the topic and the difficulty involved in identifying a single noise level that could apply to a great variety of tasks and conditions. Although these difficulties still pertain, much research has been generated in this area over recent years.[16]

Noise can cause adverse effects on task performance and behavior at work, and in nonoccupational and social settings. These effects are the subject of some controversy, however, since they do not always occur as predicted. Sometimes noise actually improves performance, and sometimes there are no measurable differences between performance in noisy and quiet conditions. The presence and degree of effects depends on a variety of intervening variables.

1. Sensory and Motor Effects

Experiments on the effects of noise on vision have produced conflicting results, with the suggestion of some effects on visual discrimination (Cohen, 1977). There is evidence, however, that high levels of noise can produce shifts in visual field (Parker, et al., 1976, 1978). High levels of noise can affect vestibular function, especially when the presentation to the two ears is asymmetrical (or the level of attenuation is greater in one ear) (Harris, 1968). Impulsive or other sudden loud sounds can produce a startle response that does not completely habituate with repeated, predictable exposures (May and Rice, 1971).

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[16] For a comprehensive review of the effects of noise on job performance, see Suter, 1989.

2. Noise Variables

Sound level is one of the most important parameters when predicting performance effects. The level of noise necessary to produce adverse effects is greatly dependent upon the type of task. Simple tasks remain unaffected at noise levels as high as 115 dB or above, while more complex tasks are disrupted at much lower levels. Until fairly recently, the level of beginning effects was thought to be around 95 dB for most conditions, but a summary of recent research (Jones, 1990) points to effects at much lower levels. Effects on serial reaction tasks have been noted for continuous noise with C-weighted noise levels of 90 dB (Jones, 1983) and for intermittent noise with C-weighted levels of around 80 dB (Lahtela et al., 1986).

Frequency and temporal characteristics also play a part. High-frequency sound is more disruptive than low-frequency sound, and intermittent noise can affect performance more adversely than continuous noise of equivalent energy. Aperiodic intermittencies are more likely to produce adverse effects than regular ones, and impulse noise may be even more disruptive. Again the effects are variable, depending upon task complexity and other factors.

Much of the important research in the effects of noise on performance conducted over the last decade has focused on the effects of irrelevant speech.[17] The adverse effects of irrelevant speech appear to be fairly independent of sound level, at least in the 55-95 dB range, and therefore, are not mitigated simply by attenuating them by 10 dB or so (Jones, 1990). It also appears that irrelevant speech affects processes involving memory (e.g., reasoning, mental arithmetic, and problem solving) rather than attention. With respect to reading tasks, however, meaningful speech is more disruptive than meaningless speech (Jones, 1990). These findings have significance for many modern work and school environments, where information processing and exchange is so important, especially those of the "open plan" variety.

3. Task Variables

Task complexity has been identified in numerous experiments as a crucial determinant of the effects of noise on performance. Noise exposure usually leaves simple routine tasks unaffected, and can even improve performance of monotonous tasks, presumably by elevating one's level of arousal (Broadbent, 1971). Some tasks, such as tracking and jobs requiring intellectual function, can be momentarily disrupted without decrements in overall performance (Broadbent, 1979). But if the noise level is sufficiently high or if the task becomes more complex, noise will have an adverse effect. When two or more tasks must be performed simultaneously in a noisy environment, performance on the primary task usually remains unaffected, while performance on the subsidiary task deteriorates (Hockey and Hamilton, 1970; Davies and Jones, 1975; Finkleman and Glass, 1970).

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[17] The initial work was performed by Salame and Baddeley (1982, 1983, and 1987), and has been summarized by Jones (1990) at a recent conference in Stockholm.

4. After-Effects

It seems that noise can have even greater effects *after* than during exposure. The most common after-effect appearing in the experimental literature is a reduced tolerance for frustration, manifested in a series of experiments as a reduction in willingness to persist in trying to solve insoluble puzzles (Glass and Singer, 1972; Percival and Loeb, 1980). This research also indicates that predictability of the noise signal greatly reduces its adverse after-effects (Glass and Singer, 1972). One study found that the type of noise also influenced the after-effect. Aircraft noise modified to produce sudden onsets and offsets resulted in a lower tolerance for frustration after the exposure than white noise that had been similarly modified (Percival and Loeb, 1980).

5. Effects of Noise on Social Behavior

There is extensive literature concerning the effects of noise on social behavior, and a few examples of this research will be discussed here. Singer et al. (1990) point out that noise has been used as a noxious stimulus in a variety of investigations because it produces the same biological and psychological effects as other stressors. In fact, they observe that the effects of noise combined with perceived control have been frequently demonstrated, and these investigations have also been extended to many other situations where the presence of control reliably moderates the effects of stress.[18]

In a frequently-cited laboratory study, Matthews and Cannon (1975) found that fewer subjects were willing to help someone who had "accidentally" dropped materials when background noise levels were 85 dB than when they were 65 dB. In a subsequent field study, the same results were demonstrated in a background of lawn mower noise, and this time the addition of a cast on the "victim's" arm enhanced helping behavior under quiet conditions, but failed to do so during the noise episodes (Matthews and Cannon, 1975). In another such experiment, Sauser et al. (1978) found that subjects recommended lower salaries for fictitious employees when exposed to A-weighted levels of office noise at 70 to 80 dB than in quiet. Broadbent (1979 and 1983) cites additional evidence suggesting that subjects will give each other increased amounts of shock and noise when they themselves are exposed to noise, and also cites evidence that noise increases anxiety levels (Broadbent, 1983).

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[18] Singer et al. (1990) cite the research of Langer and Rodin on the effects of patient control in a nursing home situation.

As mentioned above, the presence of control, or even perceived control, is one of the most important predictors of adverse behavioral effects. Subjects who perceive that they have control over the noise show significantly greater tolerance for frustration than subjects without control, even if the control is never exercised (Glass and Singer, 1972). In a recent experiment, Singer and his colleagues found that subjects who were told that they had control of an A-weighted, 103-dB noise stimulus showed significantly greater persistence on a difficult task than subjects who had no control or subjects that had control for only part of the experiment (Singer et al., 1990). This finding occurred despite the fact that the subjects with only partial control reported *feelings* of control no different from those with full control. To the extent that these findings can be generalized to populations living in noisy areas, this kind of research may have significant sociological implications.

6. Summary: Effects on Performance and Behavior

Noise can adversely affect task performance in a variety of circumstances. In the past, research in this area has focused mainly on the occupational setting, where noise levels must be sufficiently high and the task sufficiently complex for performance decrements to occur. Recent research implicates more moderate noise levels, especially when speech is the disruptive noise stimulus. Some research indicates that noise can also produce disruptive after-effects, commonly manifested as a reduced tolerance for frustration, and it appears that the presence and timing of control over the noise are critical to the prediction of after-effects. Even moderate noise levels can increase anxiety, decrease the incidence of helping behavior, and increase the risk of hostile behavior in experimental subjects. These effects may, to some extent, help explain the "dehumanization" of today's urban environment.

E. Extra-Auditory Health Effects

Noise has been implicated in the development or exacerbation of a variety of health problems, ranging from hypertension to psychosis. Some of these findings are based on carefully controlled laboratory or field research, but many others are the products of studies that have been severely criticized by the research community. In either case, obtaining valid data can be very difficult because of the myriad of intervening variables that must be controlled, such as age, selection bias, preexisting health conditions, diet, smoking habits, alcohol consumption, socioeconomic status, exposure to other agents, and environmental and social stressors. Additional difficulties lie in the interpretation of the findings, especially those involving acute effects. For example, if noise raises blood pressure on a temporary basis, will prolonged exposure produce permanent changes? In cases where these effects are permanent but slight, what are the long-term implications? These types of questions and problems have caused this particular area of noise research and criteria development to be very controversial.

1. Theoretical Basis

Noise is considered a nonspecific biological stressor, eliciting a response that prepares the body for action, sometimes referred to as the "fight or flight" response. The physiological mechanism thought to be responsible for this reaction is the stimulation by noise (via the auditory system) of the brain's reticular activating system (Cohen, 1977). Neural impulses spread from the reticular system to the higher cortex and throughout the central nervous system. Noise can, therefore, influence perceptual, motor, and cognitive behavior, and also trigger glandular, cardiovascular, and gastrointestinal changes by means of the autonomic nervous system. Evidence of these effects, however, is not easy to come by. Despite decades of research and probably hundreds of studies, relatively little can be said with much confidence.

2. Effects on Blood Pressure

Probably the most attention has been directed toward cardiovascular effects, especially potential elevations in blood pressure. Many studies of the stressful effects of noise have been conducted on rodents and other laboratory animals. The advantage of these studies is that they offer a greater degree of control and it is possible to have longer exposures than with human subjects. The disadvantages are that there is difficulty generalizing to humans, especially with the smaller animals, the expense involved when larger animals are used, and the prevailing public sentiment against animal experimentation.

EPA sponsored one of the most notable animal studies of noise exposure, in which Peterson and his colleagues performed five sets of experiments on the cardiovascular effects of noise on monkeys (Peterson et al., 1978, 1981, and 1983). The stimulus consisted of A-weighted levels of workplace noise at 85 to 90 dB, and the exposures were as long as 9 months. The results showed significant elevations of both systolic and diastolic blood pressure. The fact that these changes persisted long after exposure cessation argues for a chronic effect, at least in this case. Unfortunately, an attempt to replicate this experiment with another primate model was discontinued for lack of funding after only two subjects had been exposed (Turkkan, et al., 1983). Relatively few animal experiments have been conducted in this area over recent years.

With respect to laboratory investigations involving human subjects, Rehm (1983) cites six studies showing increases in blood pressure, but questions whether these effects would be permanent. In an attempt to identify more susceptible populations, Michalak et al. (1990) investigated the effects of low-flying aircraft on elderly subjects. Using recorded aircraft sounds, they found significant increases in both systolic and diastolic blood pressure after exposure to the two types of noise, with significantly greater response to the rapid-onset flyover noise. Whether or not these increases would become permanent with protracted exposure is not known.

Field studies of noise and blood pressure among workers or community residents are becoming increasingly popular, but the results are not always consistent. Rehm (1983) has reviewed 14 field studies, mostly of occupational noise exposure, and reports that the majority showed significant increases in either systolic or diastolic blood pressure, or both. Van Dijk et al. (1983), however, reports that six other studies of exposure to occupational noise found no significant differences between exposed and nonexposed groups.

Knipschild and Oudshoorn (1977) avoided some of the pitfalls characteristic of epidemiological studies by examining a population near the Amsterdam airport before and after an increase in exposure to aircraft noise, and comparing it to a nonexposed population nearby. The dependent variable was the purchase of certain prescription drugs: tranquilizers, sleeping pills, antacids, and cardiovascular drugs. The investigators found that the use of these drugs in the nonnoise area was essentially stable, whereas the use of most types of these drugs in the area newly impacted by noise increased steadily over the years investigated. This increase was especially noticeable for antihypertensive drugs.

In a more recent review, van Dijk (1990) analyzed 12 cross-sectional studies, with half of them showing a positive relation between noise exposure and blood pressure, and the others no significant effects. Van Dijk criticizes these kinds of investigations for the following kinds of weaknesses: inadequate description of noise and blood pressure measurements; absence or inadequate control of intervening variables; use of hearing loss as a determinant of exposure magnitude; use of hearing protectors; and questionable interpretation of the results. Part of the problem may be that the investigators often come from only one discipline, when, in fact, a multi-disciplinary team is needed. Thompson and Fidell (1990) recommend the use of prospective or case-control models, rather than the more convenient cross-sectional study, and they stress the importance of adequate sample size. They maintain that because any changes in blood pressure resulting from community noise are likely to be small, careful controls, large sample sizes, and at least 5 years of exposure to noise would be needed to identify significant effects.

3. Effects on Blood Chemistry

Blood chemistry is also of interest in studies of noise exposure and the cardiovascular system. In the review cited above, Rehm (1983) reports on a series of experiments, both laboratory and field, which show increased levels of the catecholamines epinephrine and norepinephrine. Among them are the series of experiments by Ising and his colleagues (1981a, 1981b, 1981c), showing a connection between noise exposure and magnesium metabolism and humans and animals. According to Rehm, this finding suggests a possible mechanism for cardiovascular effects in that a chronic magnesium imbalance can lead to increased intracellular levels of calcium (in the heart, for instance), which, in turn, can cause vasoconstriction and increases the sensitization for catecholamines.

A large epidemiological study, the Caerphilly and Speedwell Heart Disease Study in England, holds some promise for investigating the effects of road traffic noise (Babisch and Gallacher, 1990). This study of heart disease and a variety of environmental factors uses both the cross-sectional and prospective approaches, and should continue for more than 10 years. The investigators have performed detailed noise exposure measurements. Sample sizes of more than 2,000 men have been drawn from both the Caerphilly and Speedwell communities, and controls for age, socioeconomic factors, family history, body weight, smoking habits, alcohol, and physical activity have been instituted. Initial results (from the cross-sectional study) indicate significant noise related elevations of serum cholesterol and glucose levels, and plasma viscosity, with an absence of significance for blood pressure or any of the other cardiovascular risk factors. The authors point out that all of the effects were slight, but even small increases, should they prove to be real, would be relevant to the public health.

4. Interactions

Several investigators have suggested that aversion to noise may be more highly correlated with health problems than the noise itself. For example, a study by Rehm (1983) found a significant correlation between noise *annoyance* and cardiovascular disorders. Her data also suggest that those with existing health problems are more annoyed by environmental factors, such as noise. Similarly, Rovekamp (1983) found that subjects who described themselves as sensitive to noise showed significantly greater noise-induced increases in peripheral vasoconstriction than their "normal" counterparts. Finally, a recent study of road traffic and aircraft noise failed to show a significant increase in blood pressure resulting from noise, but did show a correlation between the presence of noise and subjective health complaints (Pulles et al.,1990). Differences in effects between noise and nonnoise groups were dependent upon the subjects' *perceived* control over the noise, but independent of noise level.

5. Other Adverse Effects

Adverse health effects from noise exposure other than cardiovascular effects are even more difficult to isolate. Several studies have investigated the effects of noise on fetal development, with inconclusive results. Some have shown an indication of reduced birth weight or an increase in premature births, but the effects are usually slight, and (except in one case, McDonald et al., 1988), not statistically significant (Rehm and Jansen, 1978; Knipschild et al., 1981).

The effects of noise on documented mental health disorders are likewise inconclusive. Rehm (1990) cites a series of studies showing increased numbers of psychoneurotic and psychosomatic *complaints* due to noise exposure, but whether or not these complaints lead to chronic disfunction or illness is not obvious.

6. Summary: Extra-Auditory Effects

As a biological stressor, noise can influence the entire physiological system. Most effects appear to be transitory, but with continued exposure some effects have been shown to be chronic in laboratory animals. Probably the strongest evidence lies in the cardiovascular effects. However, many studies show adverse effects, while many others show no significant differences between experimental and control populations.

Undoubtedly because of the lack of consistent evidence in this area, EPA could not use data on extra-auditory health effects in its identification of safe levels of environmental noise. Instead, this subject was relegated to a brief discussion in an appendix in the *Levels Document*. Although considerable attention was devoted to this topic at the international conference in Yugoslavia, and some coverage was given in the 1973 Criteria Document, the evidence was far from sufficient and much too complex to enable the formulation of dose-response relationships. Later, EPA did fund some promising research in this area (Hattis and Richardson, 1980; Peterson et al., 1978, 1981, 1983; Turkkan, 1983), some of which has clearly demonstrated adverse cardiovascular effects at noise levels typical of occupational settings.

In the interim, there has been considerable European research activity in this area, but nearly 20 years later, criteria are still lacking. What is available, however, should give public policymakers as well as noise producers some reason for concern, especially in situations where those impacted by the noise have no control over or *perceive* they have no control over their exposures.

F. Annoyance

Annoyance is the measured outcome of a community's response to survey questions on various environmental and other factors, such as noise exposure. Although annoyance in individuals is sometimes measured in the laboratory, field evaluations of community annoyance are most useful for predicting the consequences of planned actions involving highways, airports, road traffic, railroads, or other noise sources. Factors directly affecting annoyance from noise include interference with communication and sleep disturbance, which have been discussed in earlier sections. Other less direct effects are disruption of one's peace of mind, the enjoyment of one's property, and the enjoyment of solitude. The consequences of noise-induced annoyance are privately felt dissatisfaction, publicly expressed complaints to authorities, and potential adverse health effects, as suggested above.

"Annoyance" has been the term used to describe the community's collective feelings about noise ever since the early noise surveys in the 1950s and 1960s, although some have suggested that this term tends to minimize the impact. While "aversion" or "distress" might be more appropriate descriptors, their use would make comparisons to previous research difficult. It should be clear, however, that annoyance can connote more than a slight irritation; it can mean a significant degradation in the quality of life. This represents a degradation of health in accordance with the WHO's definition of health, meaning total physical and mental well-being, as well as the absence of disease.

1. Predicting Annoyance for Public Policy Purposes

To facilitate the development of criteria and public policy, Schultz (1978) summarized and analyzed a large number of studies of community annoyance from aircraft, road traffic, and railroad noise. As part of this effort, Schultz made several simplifying assumptions, among them that the percentage of the population determined to be "highly annoyed" would be the only parameter plotted as a function of day-night average sound level. The resulting curve portrays annoyance as independent of noise source, and it has been dubbed the Schultz curve.

Recently, Fidell et al. (1991) reanalyzed the original data used by Schultz, adding new data from 11 community noise surveys. The resulting function shows slightly greater annoyance in the range between DNLs of 51 dB and 72 dB, and slightly less annoyance above about a DNL of 76 dB than the original curve. In general, the two curves are fairly close, indicating that the new studies have not drastically altered the prediction of community annoyance, at least when reactions to various noise sources are plotted together. When annoyance from various noise sources is analyzed separately, however, the new data are quite revealing, as will be discussed below.

Although it has been used internationally in the formation of noise policy, the Schultz curve has been the subject of much debate (Kryter, 1982a, 1982b; Griffiths, 1983). For example, Griffiths (1983) criticizes Schultz for treating attitudinal data categorically (highly annoyed or otherwise) rather than scaling it, for failing to analyze the distribution of annoyance, for assuming a fixed threshold for noise-related annoyance, and for choosing such an extreme criterion as highly annoyed. Perhaps because of these reasons, as well as a number of others, researchers and policymakers are beginning to examine alternatives to the Schultz curve for predicting community annoyance from noise.

2. Metrics

The metrics most commonly used to describe the relationship between noise and community annoyance are the equivalent continuous sound level, and the day-night average sound level (DNL), composite ratings based on the A-weighted sound level. The DNL is used almost exclusively for airport planning in the United States, but this practice has recently been called into question. For example, the importance of communication and relaxation in the evening hours has been recognized (in California and occasionally in Europe) by the use of the community noise equivalent level (CNEL), a metric that includes a 5-dB penalty for noises occurring between 7:00 and 10:00 pm as well as the 10-dB nighttime penalty (California Code of Regulations, 1990). In a study of the communities surrounding two French airports, residents expressed the greatest annoyance during the hours between 7:00 and 11:00 pm (Francois, 1977).

Some authorities are considering the use of the sound exposure level (SEL) for evaluating the effects of single events, such as aircraft flyovers (EPA/FAA, 1990). The importance of other parameters are also being considered, such as rise time (or onset time) as an indicator of the annoyance from low-flying military aircraft (Harris, 1989). Officials from the U.S. Forest Service report that their agency has begun to use an aircraft detectability criterion to site recreational facilities (Harrison et al., 1990).

3. Criteria

Community annoyance resulting from noise-induced activity interference was one of the most important considerations in EPA's identification of an outdoor DNL of 55 dB as the "safe" level of environmental noise (EPA, 1974a). Some years later, a Federal Inter-Agency Committee on Urban Noise (FICUN) developed guidelines for considering noise in land-use planning and control (DOT, 1980).[19]

In its noise zone classification table, "minimal" exposures to noise were defined as DNLs below 55 dB, and between DNLs of 55 and 65 dB, the exposures were labeled "moderate." However, all of these exposures were considered "acceptable" according to land-use planning standards specified by the Department of Housing and Urban Development (HUD). No research was cited to support these conclusions. In a footnote, FICUN stated the following:

> HUD, DOT and EPA recognize L_{dn} = 55 dB as a goal for outdoors in residential areas in protecting the public health and welfare with an adequate margin of safety (Reference: EPA "Levels" Document.) However, it is not a *regulatory* goal. It is a level defined by a negotiated scientific consensus without concern for economic and technological feasibility or the needs and desires of any particular community.

The Department of Transportation's Federal Aviation Administration (FAA) has adopted a DNL of 65 as the point above which residential land-use becomes "normally unacceptable." Below this level, the FAA does not require airport authorities to draw noise contours or discuss the impact of airport noise on the surrounding communities for purposes of compatibility planning or to receive grants under the Part 150 program.[20] Thus, public policy decisions, at least on the federal level, have not considered the annoyance of individuals living in the DNL 55-65 dB range.

Recent research confirms the findings of earlier investigations relied upon by the EPA, that annoyance is often generated at day-night average sound levels well below 65 dB (Fidell et al., 1985; Fidell et al., 1991; Hall et al., 1981). Figures 4 and 5 from Fidell et al. (1991) portray the responses from surveys of two mid-sized airports in California: Burbank Airport and the Orange County Airport. The percentage of respondents highly annoyed is depicted as a function of DNL, and compared to the Schultz curve. Both studies show significantly greater numbers of people highly annoyed than would have been predicted by the Schultz curve. For example, at 60 dB, as many as 70 percent of the Burbank population described themselves as highly annoyed and some 40 percent near the Orange County Airport.

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[19] FICUN was an ad-hoc interagency panel composed of representatives from EPA, FAA, HUD, the Department of Defense, and the Veterans Administration. In 1990 another such group, the Federal Interagency Committee on Noise (FICON) has been activated (focussing mainly on aircraft noise), but a report has not been published to date.

[20] Part 150 studies are conducted at airports where the noise generated by airport construction or expansion is potentially incompatible with the surrounding community. These studies must follow the procedures set out by Federal Aviation Regulations (FAR) Part 150.

Presumably because of this kind of evidence, another interagency task force has convened to discuss the extent to which day-night average sound levels below 65 dB should be taken into account in assessing the impact of aircraft/airport noise, and to examine the possible need for a single-event metric to supplement the DNL (EPA/FAA, 1990).[21]

4. Sources

The sources of noise producing community annoyance are primarily aircraft, road traffic, and railroad noise, although noise from industry, construction, and within buildings can also be problematical. The leading offenders are usually aircraft and road traffic noise, although the hierarchy depends upon many factors, such as urbanization, numbers of noise events, and proximity to the sources. Recent research indicates that, despite equivalent noise levels, some sources of community noise are more annoying than others, providing further indication that the Schultz curve cannot be valid for all circumstances.

Treating annoyance from all sources with one predictive curve provokes the hazards of oversimplification. De Jong (1990a) reports that an analysis of Dutch studies carried out over the previous 15 years showed that aircraft and highway noise produced considerably more annoyance than equivalent levels of train, tramway, and urban road noise (Miedema, 1988). The divergence was particularly pronounced at high noise levels. The fact that aircraft generate more annoyance than surface transportation is portrayed dramatically in the analysis described above by Fidell et al. (1991), where annoyance related to mid-sized airports appears substantially greater than that

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[21] The U.S. EPA and FAA put together an interagency agreement to examine the extent to which single-event analyses and information beyond the $L_{dn}=65$ contour provide useful additions to current methods of evaluating potential airport noise impacts. Under this agreement, a contractor would identify eight existing airports and perform a quantitative analysis using existing data. No new annoyance data would be developed.

Figure 4

Relationship of data from Burbank Airport Study to 1978 synthesis (Schultz) curve, showing percentage of respondents highly annoyed as a function of day-night average sound level. (After Fidell *et al.*, 1991).

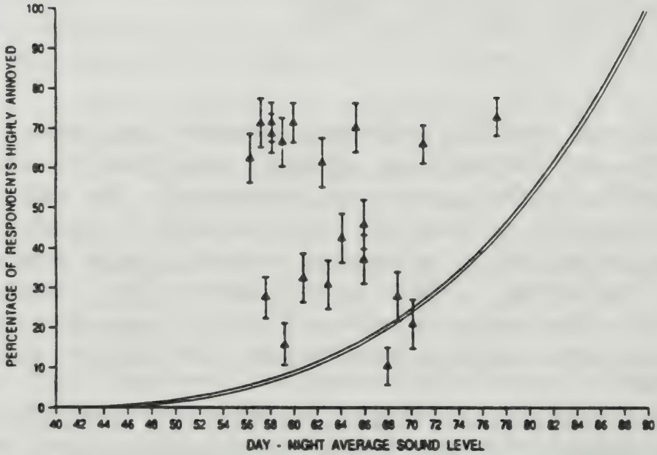
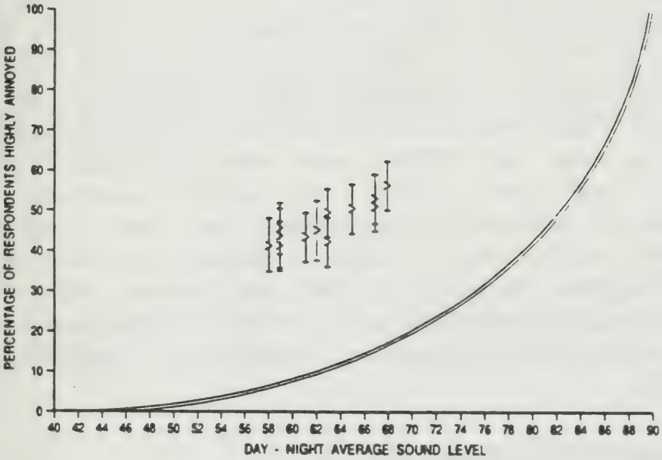


Figure 5

Relationship of data from Orange County Airport Study to 1978 synthesis (Schultz) curve, showing percentage of respondents highly annoyed as a function of day-night average sound level. (After Fidell *et al.*, 1991).



predicted by the Schultz curve, while annoyance from urban sources, such as trains, trams, and street traffic, is considerably less than that predicted by the Schultz curve.[22] Figures 6 and 7, also from Fidell et al. (1991), depict data from British and Swedish railroad studies, showing somewhat less annoyance from these sources in relation to the Schultz curve.

The explanation for these source-related differences is not necessarily that aircraft noise is inherently more annoying than surface transportation noise. It may be related to differences in people's criteria for responding to various noise sources (de Jong, 1990b; Green and Fidell, 1991). Or it may be caused by differences in sensitivity which are actually biologically based.[23] Green and Fidell (1991) point out that this evidence does not discredit the predictive validity of the DNL, but suggest that communities adopt a more sensitive criterion when evaluating the impact of aircraft noise.[24]

Impulse noise also appears to be more annoying than continuous noise of equivalent energy, and various penalties have been proposed ranging from 0 dB at relatively high ambient noise levels of about 67 dB, to 10 dB at ambient levels as low as 35 dB (Rice, 1983). Vos and Smoorenburg (1983) have recommended a formula for computing the impulse noise penalty, taking into account the type of noise source, the signal level, and the ambient noise level.

As de Jong points out (1990b), most people are exposed to some combination of noise sources, posing a very complex predictive problem. Several models for predicting noise annoyance from complex sources have been proposed, but most fail to solve the difficult theoretical problems involved (de Jong cites Berglund et al., 1981, and Miedema, 1985). Among the groups working on these models are the Institute for Sound and Vibration Research in England, and the Netherlands' Organization for Applied Scientific Research, TNO.

5. Nonacoustics Variables

Although it is clear that community annoyance is positively correlated with noise exposure level, other variables also appear to be important, such as ambient noise level, time of day and year, location, and socioeconomic status. None of these other variables, however, is as powerful as the attitude of the residents surveyed. This is a good example of the fact that the human being is not a black box, where the effect is a simple consequence of the input. In a recent analysis of 280 social surveys, Fields (1990) examined 17 hypotheses as they relate to community annoyance from noise. Besides noise exposure level, the only variables Fields identified as strongly correlated with noise annoyance were the attitudinal hypotheses: (1) fear that the noise source might be a danger to the neighborhood, (2) belief that the noise is preventable, (3) awareness that nonnoise problems are associated with the noise source, (4) stated sensitivity to noise, and (5) belief that the economic activity represented by the source is not important for the community.

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[22] See also Fidell et al. (1985), Hall et al. (1981), and de Jong (1990).

[23] De Jong (1990b) cites the work of Di Nisi et al. (1987) and Ising, et al. (1981b) to support this theory.

[24] Green and Fidell found a difference of 5.2 dB between the noise levels at which the same percentage of people are highly annoyed by aircraft noise versus noise from surface transportation.

6. Habituation

The evidence is fairly clear that so long as the stimulus remains the same, noise annoyance does not subside over time (e.g., Fields, 1990). Griffiths (1983) cites studies showing no habituation for highway noise 4 months to 2 years after the opening of new routes. De Jong (1990) found that annoyance in a previously surveyed community *increased* by 10 percent with no change in noise levels. He suggests that this increase could represent a shift of internal criteria due to increased publicity and other factors, or perhaps an increase in physiological sensitization.

Figure 6

Relationship of data from British Railroad Study to 1978 synthesis (Schultz) curve, showing percentage of respondents highly annoyed as a function of day-night average sound level. (After Fidell *et al.*, 1991).

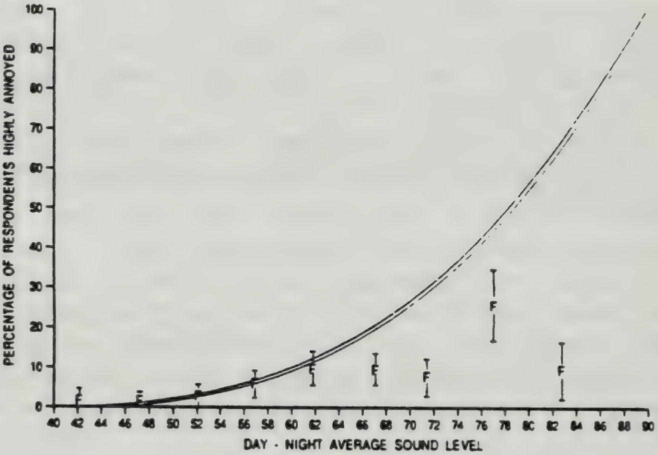
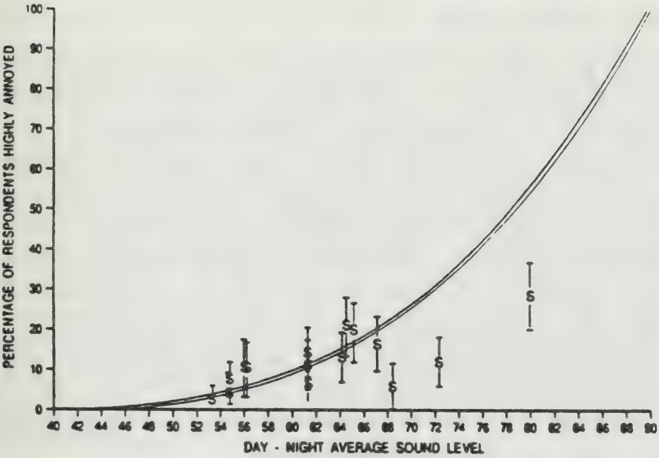


Figure 7

Relationship of data from Swedish Railroad Study to 1978 synthesis (Schultz) curve, showing percentage of respondents highly annoyed as a function of day-night average sound level. (After Fidell *et al.*, 1991).



7. Annoyance and Health

There has been very little study of the effects of noise-related annoyance on general health, although this would appear to be a fertile field. The study mentioned in section E.4. above by Rehm (1983) suggests a relationship between annoyance and cardiovascular disorders. Likewise, another study indicates a connection between noise and subjective health complaints (Pulles, et al., 1990). De Jong (1990a) refers to the recent use in Germany of the concept of "substantial annoyance" as a predictor of possible health damage.[25] He recommends the development of an integrated theory of noise effects "to uncover the relationships among medical, physiological, behavioural, and ecological effects of environmental noise." (de Jong, 1990a, p.520)

8. Summary: Annoyance

Annoyance can be viewed as the expression of negative feelings resulting from interference with activities, as well as disruption of one's peace of mind and the enjoyment of one's environment. Although this reaction can run the gamut of mild irritation to extreme distress, only responses categorized as "highly annoyed" (and greater) have been used to measure the impact of noise on communities. The most respected and widely used criterion to assess community annoyance in the U.S. has been the Schultz curve, although this criterion has been the subject of heated debate. Several recent studies indicate that the Schultz curve underestimates annoyance due to aircraft noise and overestimates annoyance from the noise of urban traffic and trains, leading to the conclusion that annoyance from these categories should be assessed separately. In addition, there has been growing interest in supplementing the traditional DNL with a descriptor for single events.

EPA's *Levels Document* identified the outdoor level to protect against activity interference as a day-night average sound level of 55 dB. This identification was not to be construed as a standard or regulation,[26] but as information to aid states, localities, and the general public. Later, an interagency task force identified average levels between 55 and 65 dB as "acceptable" for purposes of land-use planning. The DNL 65-dB criterion, which has been applied particularly to airport noise assessments, is now being reconsidered by another interagency task force.

There is evidence that impulse noise is more annoying than continuous noise of equivalent energy, and various correction factors have been proposed to account for the difference. In addition, most people are exposed to a combination of noise sources, and models for predicting the resulting annoyance are in the formative stages.

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[25] De Jong cites Jansen (1986).

[26] See Foreword, *Levels Document* (EPA, 1974a).

The most important variables other than noise exposure level relate to people's attitudes about the noise, such as fear of possible danger, stated sensitivity, and the belief that the noise is preventable. Finally, it appears that noise-related annoyance does not subside over time.

VI. Conclusions

Noise has a significant impact on the quality of American life. There is no evidence that the impact has diminished in the years since ONAC was abolished. Rather, it appears that the impact is at least as great, and most probably greater, than it was 10 years ago, due to population growth, especially in urban areas, and the proliferation of certain noise sources.

A considerable amount of noise effects research has been conducted over the last decade, much of it taking place in the European nations where governmental concern about noise is greater than it is in the United States at this time. These studies have expanded the knowledge base and filled certain gaps. Many of them suggest important interrelationships between the various noise effects that remain largely unexplored. For example, perceived control over noise appears to decrease its adverse effects on the subsequent performance of certain tasks. The concept of control also has a bearing on annoyance from noise, as do several other nonacoustic factors. Annoyance appears to be related to extra-auditory health effects, and chronic sleep interference, which is a component of annoyance, can have adverse effects on health and well-being.

All of these effects are, to a varying degree, stress related. Nowadays there is increasing evidence in the medical literature on the relationship between stress and illness, one which is often exacerbated by lack of control.

Cumulatively, this evidence suggests the potential for a unifying hypothesis that may well explain some of the health effects that have been observed in connection to noise exposure, but have usually been dismissed because of the absence or insufficiency of direct cause and effect relationships. Such a hypothesis, however, can only be validated by a new interdisciplinary approach, one which takes a broader and somewhat different perspective than is currently employed. This approach could very well provide the key to understanding a great deal more about the general impact of noise on society, and the extra-auditory effects in particular.

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Report for Recommendation 92-8

The Office of Juvenile Justice and Delinquency Prevention's Formula Grant Program: A Regulatory Approach to Federal Grant-Making

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Executive Summary

The Office of Juvenile Justice and Delinquency Prevention (OJJDP), created by the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDP Act), has among its responsibilities the administration of a formula grant program that distributes "conditioned" financial assistance to states and local governments for the purpose of improving their juvenile justice and delinquency prevention systems. Formula grant funds can be used for a broad spectrum of activities, including diversion of youth from the juvenile justice system, provision of community-based alternatives to confinement in secure facilities, improvement of sentencing procedures and detention criteria, and assistance in effective rehabilitation of offenders. Federal monies are allocated among states on the basis of the population in each state under the age of 18. In conjunction with a State Advisory Group (SAG), a designated agency in each state prepares 3-year program plans and disperses grant monies to local governments and private agencies.

Receipt of federal money is conditioned on compliance with 3 substantive mandates by the dates specified in the legislation. Compliance dates may be extended in certain circumstances. Specifically, the mandates require that--

> 1. juveniles who are accused or convicted of status offenses (that is, conduct not considered an offense if committed by an adult, such as truancy) and nonoffenders (such as abused children) must not be placed in secure detention or secure correctional facilities;
>
> 2. juveniles who are accused or adjudicated of delinquency (that is, conduct that constitutes an offense regardless of the age of the offender) or status offenses must not have regular contact with incarcerated adults where both juveniles and adults are confined in the same institution; and
>
> 3. no juvenile (whether a nonoffender or an alleged or adjudicated status offender or delinquent) may be detained or confined in any adult jail or lockup (one type of institutional facility).

In enacting these mandates Congress determined that status offenders represented a type of behavioral problem which might become worse because of exposure to a treatment and prevention mode that utilizes a jail-like environment and that confinement of juveniles with adults creates such risks to the physical and emotional well-being of juveniles as well as to their rehabilitation that reliance on adult jails for detention and confinement purposes is simply unacceptable. The first two mandates were adopted in 1974 and the last in 1980.

At the same time, however, Congress recognized that there were exceptional circumstances wherein departures from the mandates were justified. Accordingly, it permitted secure holding of status offenders who violated a "valid court order" (e.g., a child who violated the terms of probation) as a means for courts to deal with so-called "chronic" status offenders. It also allowed rural areas to hold youths for up to 24 hours in an adult jail or lockup where there was no available appropriate alternative placement. Moreover, the legislative history of the JJDP Act approves the holding of alleged status offenders in secure facilities for up to 24 hours and alleged delinquents for up to 6 hours in adult jails as concessions to the difficulties police may encounter in determining and effectuating appropriate placements for detained youth. In addition, OJJDP has fashioned de minimis "full" compliance standards, which permit continued funding to states as long as the number of youths held in violation of the literal terms of the mandates is small or there are "exceptional" circumstances.

Congress has established specific deadlines for compliance with the mandates. The deinstitutionalization of status offenders (DSO) was to be accomplished within 3 years of a state's initial participation in the program and the jail removal mandate by 1985. Because of the perception that states might encounter difficulties in meeting these deadlines and because actual experience demonstrated such problems, Congress allowed for extension of the DSO deadline for up to 2 years where a state was in "substantial" compliance (measured by a percentage reduction in the holding of status offenders). The jail removal deadline could be extended to December 1988 on the basis of a finding of substantial compliance (defined alternatively 1) in percentage reduction terms and 2) as progress and good faith effort in trying to achieve full compliance). Moreover, OJJDP could grant a state a waiver where substantial compliance was not achieved (prior to 1988) and even after 1988 as long as the state was willing to use all its formula grant funds to achieve compliance with the jail removal mandate. With regard to the separation mandate, OJJDP has interpreted the deadline for final compliance in terms of a "reasonable" time, which has basically mooted the need for formal extension mechanisms.

In order to determine states' progress in attaining compliance, Congress required state establishment and OJJDP auditing of monitoring systems to cover secure public and private facilities, including jails and lockups. Over the years, there has been considerable concern expressed regarding the quality of these systems, though states have attempted to improve them.

Monitoring reports must be provided by the states to OJJDP on a yearly basis and are used to determine eligibility for the upcoming fiscal year's formula grant. Recently filed monitoring reports suggest that almost all states are in compliance with the DSO mandate and that, even where the separation mandate has not been attained, there has been substantial progress. Jail removal, however, remains unaccomplished in almost one-third of the states and appears to create the most contentiousness today in terms of OJJDP's relationship to the states. With the budget pressure on state and local governments, the achievement of full nationwide compliance in the near future may be put in jeopardy as juvenile justice improvement must compete with other budget priorities at the state and local levels. Moreover, even after compliance has been attained, there remains the problem of maintaining it--and backsliding has in fact occurred in some instances.

The entity in OJJDP that administers the formula grant program--the State Relations and Assistance Division (SRAD)--is very small in terms of personnel. The day-to-day business of relating to state agencies and communicating and "enforcing" federal policy falls to the "state representatives" (eight positions) whose counterparts on the state level are known as "juvenile justice specialists" (one per state).

Neither the Reagan nor the Bush Administrations have favored the continuation of the formula grant program. However, Congress has persisted in appropriating monies, which have ranged from a high of $63 million (1980) to a low of $40 (1988) (noninflation adjusted dollars). Using the GNP implicit price deflation for government purchases of goods and services, there was a 52 percent decline in purchasing power for the formula grant program between 1980 and 1989.

In addition to OJJDP, the State SAGs and state agencies, there are three other entities which Congress has involved in the administration of the formula grant program: the National Coalition of State Juvenile Justice Advisory Groups (a membership group of all the state SAGs) which is installed as the advisor to the Administrator and Congress on the formula grant program; a technical assistance provider to help states with their compliance efforts; and the Coordinating Council on Juvenile Justice and Delinquency Prevention which is comprised of the heads of federal agencies with some involvement in issues relating to juvenile justice and delinquency and which is required (as its name suggests) to coordinate federal policymaking and efforts in the juvenile justice area (taking into account the mandates of the JJDP Act).

The study undertaken by the consultants focused on issues of administration and procedure--not substantive policy. Whether or not the mandates represent good social policy and, in fact, whether or not they have been fully or substantially "attained" were issues beyond the scope of our research. Similarly, the question of whether some other type of federal grant-making mechanism is preferable to the existing formula grant program was not addressed in our research or report. At the same time, it must be noted that some state officials indicated that the formula grant program, as it is currently administered, neglects such problems as delinquency prevention, gangs, violent, sex and drug offenders, and conditions of confinement.

Following completion of this study, Congress adopted amendments to the JJDP Act (i.e., The Juvenile Justice and Delinquency Prevention Act Re-Authorization Act). Even though it has become law, however, neither the conclusions of the study nor the draft proposed recommendations are so affected as to require modification. For the purpose of completeness, the report describes in general terms, as a postscript, how the amendments change the formula grant program.

I. Introduction

Despite the extent of Congress's regulatory authority under the Commerce Clause and other Article I powers, its ability to directly command the achievement of certain policies is subject to various express and implied constitutional limitations.[1] Nevertheless, its authority to "provide for the common Defense and general Welfare of the United States"[2] has proven to be a basis on which it can indirectly achieve its purposes through the mechanism of imposing conditions on the receipt of federal funds granted to states.[3] Grant programs vary in the degree to which such conditions are "merely" procedural, rather than "substantive."

The focus of this study is one such grant program wherein the substantive conditions on funding, along with the devices utilized to accommodate difficulties of compliance with those conditions, create what appears to be a hybrid institution: a federal grant-making agency which in many respects operates in the mode of a traditional regulatory agency. Moreover, at least among categorical formula grant programs designed to provide financial assistance to state and local governments for the delivery of social services, it is unique in its administrative characteristics.[4]

In 1974 Congress enacted the Juvenile Justice and Delinquency Prevention (JJDP) Act, which created the Office of Juvenile Justice and Delinquency Prevention (OJJDP) within the Law Enforcement Assistance Administration of the U.S. Department of Justice. Among OJJDP's responsibilities--which

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[1] *See, e.g.,*, New York v. United States, 112 S. Ct. 2408 (1992) (invalidating the "take title" provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 and relying also on the Tenth Amendment).

[2] U.S. Const. art. I, §8, cl. 1.

[3] *See, e.g.,*, New York v. United States, 112 S. Ct. at 2419 (1992). *See also* Madden, *Terms and Conditions of Federal Grants*, 18 URBAN LAW. 551 (1986). For commentary expressing concern over and proposing limits on congressional power in this regard *see, e.g.,*, Note, *Taking Federalism Seriously: Limiting State Acceptance of National Grants*, 90 YALE L.J. 1694 (1981); Note, *Federal Funds and the National Supremacy: The Role of State Legislatures in Federal Grant Programs*, 28 AM. U. L. REV. 279 (1979); Note, *The Federal Conditional Spending Power: A Search for Limits*, 70 NW. U. L. REV. 293 (1975).

[4] See text preceding note 427 *infra*.

remain in force today--was that of administering a formula grant program to states and local governments. Significantly, while the overall purposes of the formula grant program were broadly framed, the statute also required that several very specific, substantive and concrete outcomes had to be achieved by the states within a set timetable. Compliance with those outcomes or "mandates", as well as with a variety of other administrative and procedural requirements, continues to determine eligibility for JJDP formula grant funds.

Monitoring for levels of state compliance, determining grant eligibility status, reviewing submitted plans and reports, and responding to technical assistance requests all fall to OJJDP's State Relations and Assistance Division (SRAD). State participation in the formula grant program is strictly voluntary, with state funding levels determined on the basis of relative population under age 18. Administration of the formula grant program is guided by a substantial body of regulations, rules, policies and interpretations that the Office has developed over the past 17 years. Mechanisms such as de minimis criteria, exceptions, and waivers--characteristic features of regulatory bodies--have been adopted by either Congress or the agency over the course of the administration of the program.

The purposes of this study were (1) to examine OJJDP's approach in its administration of the JJDP formula grant program and (2) to formulate recommendations based on the findings. The report that follows describes and analyzes in detail the administrative processes used by SRAD to monitor, assist and determine state compliance with the statutory mandates and requirements. In addition, the report examines issues of communication and information dissemination to and consultation with states, coordination and collaboration at various levels of government, consistency and clarity of policy elaboration, timeliness, staffing and training. Finally, for comparative purposes, four other federal formula grant programs were examined to determine whether administrative, regulatory and implementation issues similar to those facing SRAD have surfaced, and if so, how they have been handled.

The three-person study team employed a variety of methods and approaches in gathering and analyzing information. Over 70 in-person interviews and a national telephone survey of state officials were conducted. In addition, a wide variety of policy and procedure manuals, caselaw, training materials, internal files, memoranda, correspondence, legislative materials, reports and other public and private evaluations of OJJDP and other relevant subjects were reviewed.

At the federal level, in-person interviews were held with the Administrator of the Office, present and former SRAD Directors, the Assistant SRAD Director, present and former SRAD state representatives, Office of General Counsel staff, and present and former Congressional oversight staff. Senior administrative staff with the four federal formula grant comparison programs were also interviewed in-person.

At the state level, a telephone interview was conducted with the juvenile justice specialists from all 50 states and the District of Columbia. A summary of the methodology used for analyzing survey data, the full questionnaire containing the responses, and a separate narrative summary of the phone survey results are found in various referenced appendices to this report. In order to provide more in-depth information and insight, moreover, 10 states were selected for on-site data gathering and interviewing.[5] The 10 states were chosen to obtain as balanced a picture of state experiences and viewpoints as possible. Thus, states were chosen on the basis of region of the country, population, geographic characteristics, degree of urbanization, and status with regard to compliance with the mandates. The ten states included California, Illinois, Maine, Maryland, New Mexico, Montana, South Carolina, Wisconsin, Oregon, and Pennsylvania.

In-person interviews were conducted in each state with the juvenile justice specialist, State Advisory Group (SAG) chairperson (where available) and one or more members of the SAG familiar with the workings of the formula grant program. In a number of the states, representatives of the designated state supervisory agency, the youth corrections agency and agencies conducting statewide monitoring were also interviewed in-person.

In addition, representatives from a number of other involved groups and organizations were interviewed. These included the National Coalition of State Juvenile Justice Advisory Group's (NCSJJAG), the Reauthorization Committee of NCSJJAG, and Community Research Associates, Inc. (the technical assistance provider for SRAD). Members of the study team also attended as observers several National Coalition meetings and a congressional field hearing on reauthorization of the JJDP Act.

The report is divided into six sections. Section II provides a descriptive overview of the statutory and administrative structure and organization of the OJJDP formula grant program, the substantive mandates of the Act, and OJJDP's rules and major compliance policies. Section III is a detailed analysis of OJJDP's exercise of policymaking authority. Topics covered include consultation with outsiders, use of the Federal Register for notification purposes, administrative flexibility, personnel and coordination. Section IV examines the role and operation of entities outside OJJDP that also are involved in the implementation of the formula grant program. Section V describes various provisions of the Juvenile Justice and Delinquency Prevention Act Re-Authorization Act of 1992, which was enacted by Congress following the completion of our study. The Re-Authorization Act changes various important aspects of the formula grant program, though not in ways affecting our evaluation of the program to date or our recommendations for future improvement. Section VI presents an overview of federal grant mechanisms along with analysis comparing OJJDP's formula grant program with four other federal, human service, formula grant programs. Finally, Section VII sets forth the 18 recommendations which result from our study.

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[5] Officials from one state, California, were interviewed at a meeting of the National Coalition of State Juvenile Justice Advisory Groups in Santa Fe, New Mexico in September 1991.

II. The Office of Juvenile Justice and Delinquency Prevention and Its Formula Grant Program

The Juvenile Justice and Delinquency Prevention Act of 1974[6] followed more than a decade of experience with federal financial assistance programs for state, local and private nonprofit agencies employed for the purpose of dealing with the problems of juvenile crime and delinquency.[7] In 1967 President Johnson's Commission on Law Enforcement and the Administration of Justice not only recommended that the federal government's role in the area of juvenile justice be enhanced but also proposed a variety of strategies for reducing juvenile crime, including decriminalization of status offenses,[8] diversion of youth from court procedures into public and private treatment programs, and the use of community group homes and nonresidential treatment facilities rather than formal institutional settings.[9] Dissatisfaction with efforts under prior legislation, including lack of planning and coordination, along with increasing concern with regard to the perceived harmful effects of certain juvenile justice practices set the stage for the enactment of the 1974 Act,[10] which was subsequently reauthorized and amended no less than four times during the next 14 years.[11]

As the legislation stands today, the Office of Juvenile Justice and Delinquency Prevention (OJJDP), located in the Department of Justice, administers a variety of programs including a formula grant program to states and local governments. The purposes of that program are "to assist them in planning, establishing, operating, coordinating, and evaluating projects directly or through grants and contracts with public and private agencies for the development of more effective education, training, research, prevention, diversion, treatment, and rehabilitation programs in the area of juvenile delinquency and programs to improve the juvenile justice system."[12] Funds made available for appropriation are allocated annually among participating states on the basis of relative population under age 18.[13]

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[6] Pub. L. No. 93-415, 88 Stat. 1109. It should be noted that the description of the JJDP Act in general and the formula grant program in particular contained in Sections II-IV of this report is based on the Act prior to its 1992 amendments.

[7] Raley & Dean, *The Juvenile Justice and Delinquency Prevention Act: Federal Leadership in State Reform*, 8 LAW & POLICY 397, 398-99 (1986).

[8] That is to say, keeping status offenders (conduct not considered an offense if committed by adults) outside the criminal/juvenile justice system for any prevention, treatment or sanction purpose.

[9] Raley & Dean, *supra* note 7, at 399.

[10] *Id.* at 400.

[11] *Id.* at 403-409.

In addition to the formula grant program and programs for training, research, and the collection and dissemination of information with regard to the prevention and treatment of juvenile delinquency,[14] the Office administers a special emphasis grant program that provides funds to public and private nonprofit agencies and organizations for a variety of purposes, including the establishment of community-based alternatives to traditional forms of institutionalization of juvenile offenders and implementation of special emphasis prevention and treatment approaches to juveniles who commit serious crimes.[15]

Of all the features that characterize the OJJDP formula grant program, the most distinctive are the specific substantive mandates, which condition receipt of funds. Compliance with these mandates enables a state to use allocated funds for a broad variety of programs and services related to juvenile justice and the treatment and prevention of juvenile delinquency. The three substantive mandates (along with the dates of their enactment) are as follows:

> 1. Juveniles who are accused or convicted of status offenses (conduct not considered criminal if committed by an adult, such as running away and truancy) and nonoffenders (such as abused, dependent, and neglected children) must not be placed in secure detention or secure correctional facilities (1974).
>
> 2. Juveniles who are accused or adjudicated of delinquency or status offenses must not have regular contact with incarcerated adults where both juveniles and adults are confined in the same institution (1974).

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[12] 42 U.S.C. §5631(a).

[13] *Id.* §5632(a)(1).

[14] *Id.* §§5651-61.

[15] *Id.* §5665.

3. No juvenile may be detained or confined in any adult jail or lockup (1980).[16]

Congress has imposed deadlines for compliance with these mandates and, over the years, provided for extensions through various mechanisms, including substantial compliance standards and waivers of termination. In addition, the Office has formulated administrative rules to accommodate good faith efforts by states to achieve the mandates in the face of substantial financial and other barriers and thus avoid the sanction of grant denial or termination.

Notwithstanding the relatively small size of state allotments,[17] virtually all of the state officials interviewed felt that the federal money has been extremely important in starting and sustaining valuable initiatives for the improvement of juvenile justice and delinquency prevention. By many accounts, the statutory mandates along with the potential loss of federal funds have at times been used at the state level to fend off attempts to undermine compliance efforts. In other states, officials have preferred to "sell" the mandates to state legislators and interested groups on their merits alone because of local aversion to federal "control." Fears of legal liability (whether under state or federal law) have provided additional motivation for compliance with the mandates, as have the economic costs of juvenile jailing and the overcrowded condition of many facilities.

Today, despite the sometimes slow pace of compliance efforts, there has been reported significant progress in meeting the deinstitutionalization of status offenders mandate along with the separation mandate. Jail removal--the most recent and likely the most costly of the three--still lags in many states, though approximately two-thirds of the states now report full compliance.

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[16] "Juveniles" within the meaning of this mandate include alleged and adjudicated status offenders, nonoffenders, and delinquents (i.e., juveniles who are charged with or convicted of offenses which would be crimes if committed by an adult).

While jail removal may, in many instances, make the separation mandate superfluous, that is not always the case. For example, the jail removal mandate does not apply to facilities used for long-term confinement of juveniles and adults, *see* text at notes 90-91 *infra*. The separation mandate is applicable in those circumstances, however.

The deinstitutionalization of status offenders mandate does not cover "delinquent" offenders and it extends to "secure" facilities, that is those public and private residential facilities wherein construction features are designed to physically restrict the movements and activities of those in custody.

[17] There is a $325,000 minimum allocation. Seventeen states and the District of Columbia received the minimum allocation in FY 89. For a list of the participating states, see Appendix A, which is available upon request from the Conference.

However, it is crucial to note at this point that the adoption and implementation of the mandates has not been uncontroversial. For example, OJJDP observed as late as 1989 that:

> Since its inception, DSO (deinstitutionalization of status offenders) has been hotly debated, engendering high praise from its supporters and strong criticism from those who oppose it. . . .
>
> Many saw [it] as the solution to providing fair, more humane treatment for status offenders . . . . For others, DSO represented a shirking of public responsibility that often resulted in inadequate responses and a loss of parental authority and justice system control over seriously troubled youth.[18]
>
> Moreover, some federal and state officials have raised serious questions regarding the need for as well as the structure of the existing formula grant program. For instance, the telephone survey of state juvenile justice specialists conducted as part of this study found that nearly three-quarters of the specialists believed that the program, as currently administered, neglected significant juvenile justice needs including prevention, gang problems, violent, drug and sex offenders, and conditions of confinement.[19] Some also identified what might be considered undesirable side-effects of the mandates, such as an increased prevalence of waiving minors to the adult criminal justice system and a tendency to charge youth with more serious offenses rather than status offenses.[20]

The issues thus raised regarding the appropriateness (as a matter of social policy) of the OJJDP Act's mandates as they currently exist or might be reformulated or enlarged, the need for a federal role in the area of juvenile justice, and, if there is a need, the appropriate type of federal financial assistance program are all extremely significant. They deserve thoughtful and detailed examination both within and outside of government. However, from the beginning, the focus of this study has eschewed such broad substantive questions. Rather we have concentrated on the administration of the OJJDP formula grant program within the confines of the OJJDP Act as it currently exists and the largely procedural issues which such a focus presents.

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[18] U.S. Department of Justice (Office of Juvenile Justice and Delinquency Prevention), *Assessing the Effects of the Deinstitutionalization of Status Offenders* in Juvenile Justice Bulletin/OJJDP Update on Research (Jan. 1989) at 1.

[19] See Appendix D3 at 4, which is available upon request from the Conference.

[20] *Id.* at 4-5 *infra*.

A. Administrative Structures for Implementing the Formula Grant Program

1. The Office of Juvenile Justice and Delinquency Prevention

a. Overview.

The Office began its institutional life in 1974 as part of the Law Enforcement Assistance Administration in the Department of Justice. LEAA was phased out in 1982 and OJJDP operated for a time as part of a newly created Office of Justice Assistance, Research and Statistics. In 1984 the Justice Assistance Act[21] created the Office of Justice Programs (OJP) headed by an Assistant Attorney General. Other than OJJDP, the program offices of OJP include the Bureau of Justice Assistance, the National Institute of Justice, the Bureau of Justice Statistics, and the Office for Victims of Crime. Each program office receives professional, technical and administrative support, including financial management, congressional liaison, and legal and personnel services, from OJP. All five program offices within OJP are headed by presidential nominees whose appointments are subject to Senate confirmation.

OJJDP is, by statute, "under the general authority of the Attorney General."[22] The OJJDP Administrator is required to have had experience in juvenile justice programs prior to appointment.[23] Status as a presidential appointee with Senatorial confirmation was intended "to underscore the importance of the Office and to provide the appropriate status and identity required for the national focus on delinquency prevention. . . ."[24]

The Administrator is specifically empowered "to prescribe regulations consistent with this Act to award, administer, modify, extend, terminate, monitor, evaluate, reject, or deny" the formula and discretionary grants authorized by the JJDP Act.[25] Moreover, under the "General and Administrative Provisions" of the statute, the Administrator is authorized "after appropriate consultation with representatives of States and units of local government, to establish such rules, regulations, and procedures as are necessary for the exercise of the functions of the Office and as are consistent with the purpose" of the JJDP Act.[26]

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[21] Pub. L. No. 98-473.

[22] 42 U.S.C. §5611(a). *See also id.* §5672(a).

[23] 42 U.S.C. §5611(b).

[24] S. Rep. No. 95-165, 95th Cong., 1st Sess. at 52 (1977).

Finally, the Administrator is directed to "develop objectives and priorities for all Federal juvenile delinquency programs and activities relating to prevention, diversion, training, treatment, rehabilitation, evaluation, research, and improvement of the juvenile justice system in the United States."[27] Thus, despite statutory restrictions such as those applicable to the allocation of formula grant funds, the Administrator is given a significant leadership role in the area of juvenile justice and delinquency prevention policy.

The Reagan and Bush Administrations have not requested that Congress fund the OJJDP formula grant program.[28] Nevertheless, appropriations have been made by Congress and have ranged from their highest point (during the Carter Administration) of $63.7 million (1980) to a low of $40.7 million in 1988. During most of the 1980s funds available for formula grants ranged between $40 and $45 million. The first two fiscal years of the 1990s saw somewhat of an increase with formula grant monies approaching $50 million.[29] However, using the GNP implicit price deflation for government purchases of goods and services, there was a 52% decline in purchasing power for the formula grant program between 1980 and 1989.[30]

Discretionary grant fund appropriations have steadily decreased from approximately $21 million in 1978 to $6 million in 1989, with some increase in 1990 ($9 million) and 1991 ($7 million).[31]

Staffing levels authorized by Congress for OJP increased between 1987 and 1990 (from 323 positions to 352).[32] However, the rate of utilization of these positions was consistently below these authorized limits, a pattern which apparently affected all five program bureaus in OJP.[33] At the same time staff turnover in OJP between 1987 and 1990 was very high. In OJJDP it averaged 25% during that period, as compared with an OJP-wide rate of 30% and a Justice Department-wide rate of 15%.[34]

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[25] 42 U.S.C. §5611(b).

[26] *Id.* §5672(d).

[27] *Id.* §5614(a).

[28] See *GAO Disputes Data Used by U.S. to Measure Impact of JJDP Act*, 15 CRIM. JUST. NEWSLETTER, No. 9 at 3-4 (May 1, 1984) (noting the opposition of Reagan Administration to the reauthorization of Act on the basis that mandates had been achieved).

[29] OJJDP Budget Planning Staff Doc. (12/19/88). These figures are not expressed in inflation adjusted dollars.

[30] See note 427 *infra*.

[31] OJJDP Budget Planning Staff Doc. (12/19/88).

[32] Department of Justice, Justice Management Division, A Management Review of the Office of Justice Programs [hereinafter "JMD Report"] (Nov. 1990), Figure J.

b. Organization within the Office.

OJJDP has four Divisions, only one of which--State Relations and Assistance (SRAD)--was the primary focus of this study. At the same time, several of the other components engage in functions that relate to the responsibilities of SRAD. (Table 1 is an organizational chart for the Office.)

The other three divisions of OJJDP and their functions are as follows:

> 1. The Training, Dissemination, and Technical Assistance Division (TDTAD) is responsible for programs that train professionals and others who work with juvenile offenders and their families and for technical assistance to public and private agencies engaged in the planning, establishing, funding, operating, and evaluating juvenile delinquency programs. Finally, TDTAD serves as a clearinghouse and center for the preparation, publication, and dissemination of information regarding juvenile justice.[35]

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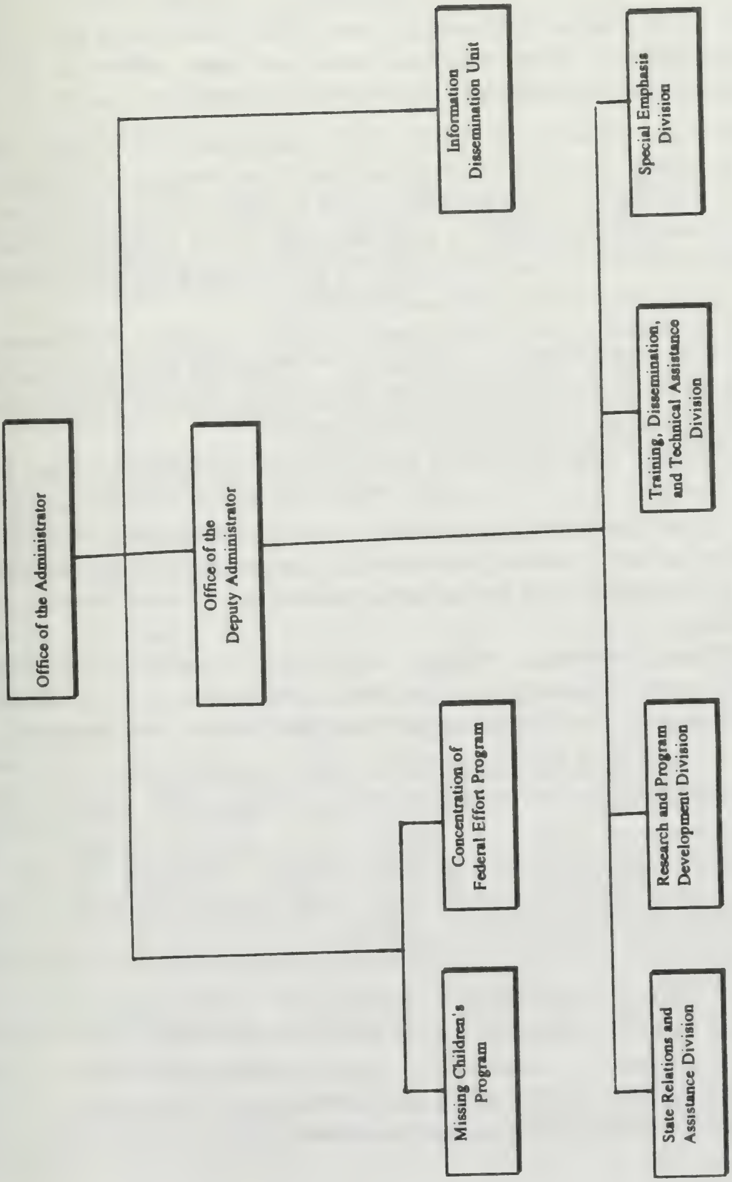
[33] *Id.* at 22 and Figure J.

[34] *Id.* at 22 and Figure 4.

[35] There is also a new, separate Information Dissemination Unit which is responsible for publication of OJJDP-related information.

Table 1

Table 1
Office of Juvenile Justice and Delinquency Program


Office of the Administrator
Office of the Deputy Administrator
Information Dissemination Unit
Concentration of Federal Effort Program
Missing Children's Program
Special Emphasis Division
Training, Dissemination, and Technical Assistance Division
Research and Program Development Division
State Relations and Assistance Division

> 1. The Research and Program Development Division (RPDD) sponsors programs to evaluate trends in juvenile delinquency, the causes of delinquency, effective prevention strategies, and alternatives to traditional dispositions in the juvenile justice system, among other matters.
>
> 2. The Special Emphasis Division (SED) administers the discretionary grant program used to foster promising approaches to delinquency prevention and control.

SRAD is the division of OJJDP which administers the formula grant program including oversight of compliance with the statutory mandates. In addition, it provides, through its own staff or through the services of outside contractors, technical assistance to grant recipients to aid in their compliance with the mandates as well as in their use of grant monies for other purposes related to juvenile justice and delinquency prevention.

SRAD is headed by a Director and Assistant Director. Staff work is performed by so-called "state representatives." There are eight positions now allocated for state representatives, though filling them in recent years has been made difficult by hiring freezes instituted by OJP.

Within the last year, two-person teams of state representatives have been assigned to regions (4) of the country. This was reportedly done in part to ensure that less experienced staff members could learn from more experienced employees as well as to provide more continuity in coverage for each state than had been the case previously due to staff turnover and frequent shifts in staff responsibilities.

The official description of the roles and responsibilities of state representatives make it clear how crucial they are to the day-to-day functioning of the Division and, therefore, to the success of the formula grant program:

> 1. "The State Representative has lead responsibility for all activities initiated by [SRAD] with [state agencies], unless otherwise assigned . . . . He/she is the conduit through which information and assistance flows. Requests for assistance from other staff must come through the State Representative or the Division Director."
>
> 2. "Where information is provided [to a state agency] directly by the Director or other staff, this information must be recorded on a 'contact sheet' and the original given to the assigned State Representative for information and filing . . . . The State Representative cannot represent this Office unless

> fully informed, and the Division's messages will not be consistent unless coordinated."
>
> 3. "In addition, the State Representative should inform OJJDP staff about innovative, successful projects, and program needs in assigned states."
>
> 4. "The State Representative is viewed by the [state] as their representative and advocate in Washington with the 'bureaucracy.'"
>
> 5. "[T]he State Representative is also expected to accurately interpret Agency policies, statutes, and regulations, and to assist State staff to effectively use established Agency procedures."
>
> 6. "The responsibilities of State Representatives include the provision of technical assistance to State agencies in solving problems which interfere with plan development/implementation or with achieving/maintaining compliance with statutory mandates."[36]

State Representatives discharge these responsibilities in conjunction with a variety of specifically assigned tasks, including review of the required state 3-year plans and their supplements; processing of grant applications; review of annual performance and monitoring reports; conducting field audits of monitoring systems; reviewing budget changes; monitoring plan implementation; providing technical assistance and training with regard to plan development and implementation; responding to inquiries from state government and interested persons and organizations with regard to resources and programs which support juvenile justice and delinquency prevention activities.

State representatives have also been assigned duties that go beyond their liaison role with states. These have involved, for example, work on special task forces, participation in training sessions for state personnel, and preparation of announcements regarding special programs and initiatives.

Until recently, one of the state representatives also functioned in the position of "Monitoring Coordinator" whose job was to oversee state representatives' determinations of state compliance with the statutory mandates, prepare annual summaries of compliance status, and identify issues of compliance that might call for the adoption of general interpretative and policy statements. With the recent institution of the regional/team approach to the functions of state representatives, the position of Monitoring Coordinator was abolished. The individual who had held that position and, by all accounts, had been one of the staff members in the Division most familiar with formula grant compliance issues has now left OJJDP.

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[36] Community Research Associates, Inc., State Representative Role and Responsibilities (May 1989) [hereinafter "State Representative Roles"], contained in Vol. 1 OJJDP Formula Grants Program Manual (April 1989).

Finally, there has historically been one position for a General Attorney in OJJDP, which is to provide day-to-day legal advice and assistance to the Administrator, SRAD and other OJJDP personnel. However, that position has not been filled during the last several years. Accordingly, the Office of General Counsel, a support office in OJP, is currently the sole source for program-related legal advice and administrative counsel to OJJDP.

2. State Administrative Structures

The Juvenile Justice and Delinquency Prevention Act requires the involvement of various entities at the state level: a state agency, a juvenile justice "advisory group," and a supervisory board.

The state agency, designated by the governor of each state, may be an agency that focuses on problems of crime generally (for example, the Wisconsin Office of Justice Assistance and the South Carolina Office of Criminal Justice Programs), on issues of juvenile delinquency and crime specifically (for example, the New Mexico Youth Authority), or on the broad range of issues relating to children (for example, the Illinois Department of Children and Family Services). These entities may be part of the Office of the governor or more traditional line agencies.

The patterns of state agency staffing for the formula grant program are almost as varied as the number of participating states. Often, however, no more than one full-time personnel slot is assigned to the program, though the total workload may be divided among several people. The person who is designated as the primary staff liaison with OJJDP is known as a "juvenile justice specialist." That person may also have official responsibilities beyond the operation of the formula grant program. In addition, some aspects of the program, such as financial administration and monitoring, may be delegated to other state agencies.

The designated state agency provides the staff assistance necessary for the preparation and administration of those plans required as a condition of grant assistance and for the implementation of those plans. Such work may include, among many other tasks, the evaluation of applications by local governments and private groups for money to fund juvenile justice projects and obtaining monitoring data for compliance with the statutory mandates. The "supervisory board" of the state agency (e.g., a crime commission or council) may, within the discretion of the governor, be vested with final authority for plan preparation and administration, including the establishment of plan priorities, plan approval and the award of grant money to applicants.[37] Alternatively, that final authority may be vested in the other entity required by the JJDP Act, the state juvenile justice advisory group (SAG) appointed by the Governor.[38]

By statute, the SAG must, at a minimum, participate in the development and review of the state's required 3-year juvenile justice plan prior to submission to the supervisory board for final action; submit to the governor and legislature annual recommendations relating to its functions and compliance with the statutory mandates; and have the opportunity to review and comment on all juvenile justice prevention grant applications submitted to the state agency. In addition the SAG may be assigned a variety of other functions, including a role in monitoring for compliance with the statutory mandates and reviewing the progress and accomplishments of projects funded under the state plan.[39]

In fact, some states have viewed issues of juvenile justice as integral to the problems of child protection and development generally. Therefore, they have given their SAGs a variety of advisory and other functions over the whole gamut of social services related to children and not just the formula grant program. While neither the statute nor OJJDP regulations contemplates that approach specifically, the statutorily required membership for the SAG acknowledges the need for a multi-focus approach to the problems of juvenile crime and delinquency. SAG members may include law enforcement, corrections and probation personnel; members of public agencies concerned with welfare, social services, mental health and special education; representatives of private organizations with a special focus on maintaining the family unit or on social services for children; representatives of community-based delinquency prevention and treatment programs; representatives of businesses employing youth; and persons with special experience in addressing problems of school violence and learning disabilities.[40]

The patterns of formal and informal interactions among state agency staff, supervisory board, SAG and other state institutions (such as the police and the courts) vary from state to state and can be very complex. While state agency staff and/or the juvenile justice specialist assume the lion's share of the administrative load for the formula grant program, various members or committees of the SAG and/or the supervisory board have in some cases assumed substantial responsibility for plan preparation and administration. State officials responsible for implementation of the plan in some states even get involved in decisionmaking regarding particular cases. Local police officers have called the state juvenile justice specialist for assistance or advice regarding the incarceration or other handling of a child in custody.

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[37] 42 U.S.C. §5671(c)(1).

[38] *Id.* §5633(a)(3).

[39] *Id.*

[40] *Id.*

The JJDP Act permits no more than 7½% of the total annual allotment to a state to be made available for developing the state plan and general administration. This amount requires state dollar-for-dollar matching funds.[41] Five percent of the minimum annual allotment to a state must be made available to the SAG to assist its operations (which need not be matched by state or local funds).[42] Two-thirds of the funds made available to a state (other than the SAG allotment) must, unless the state is granted a waiver by OJJDP, be expended through programs of units of local government and local private agencies. The remainder can be expended by the state government.[43]

3. The National Coalition of State Juvenile Justice Advisory Groups

The National Coalition of State Juvenile Justice Advisory Groups, which consists of the members of the SAGS of all the states and territories participating in the formula grant program, began in 1979 as a purely voluntary organization of those persons interested in issues of juvenile justice and treatment of juvenile offenders. It has evolved to the point that its role in the implementation of the JJDP Act has been provided for in the Act itself.

The Administrator of the Office is directed under the JJDP Act to "provide technical and financial assistance to an eligible organization composed of member representatives of the State advisory groups."[44] Its statutory role includes "conducting an annual conference of such member representatives for purposes relating to the activities of such State Advisory groups"; "disseminating information, data, standards, advanced techniques, and program models developed" through various initiatives funded by OJJDP including the discretionary grant program; "reviewing Federal policies regarding juvenile justice and delinquency prevention"; "advising the Administrator with respect to particular functions or aspects of the work of the Office"; and "advising the President and Congress with regard to State perspectives on the operation of the Office and Federal legislation pertaining to juvenile justice and delinquency prevention."[45]

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[41] *Id.* §5632(c).

[42] *Id.* §5632(d).

[43] *Id.* §5633(a)(5).

[44] *Id.* §5651(f)(1).

The Bylaws of the Coalition mirror and, at the same time, expand these roles. Specifically, the Coalition is operated to provide:

> 1. a national forum for the promotion and advancement of programs, practices, activities and procedures which contribute to the prevention and treatment of juvenile delinquency and to the improvement of the juvenile justice advisory system;
>
> 2. a mechanism for State Juvenile Justice Advisory Groups to assist in the training of new SAGs and SAG Chairs, to share information among themselves and to assist in the development of national policy and legislation in juvenile justice matters;
>
> 3. a mechanism to work more closely with the Office of Juvenile Justice and Delinquency Prevention, as well as other organizations and groups involved in the juvenile justice area; and
>
> 4. information to the general public on issues related to juvenile justice.

The Coalition has a Chair and various officers, a Board of Directors composed of the Chairs of the member SAGs, a National Steering Committee, and an Executive Director with a small administrative staff. There are also four regional coalitions, Northeast, Midwest, Southern, and Western. Annually six meetings are held: one for each regional coalition, a meeting of all the SAG chairs, and a national conference. At these meetings various training is provided both SAG members and juvenile justice specialists. In addition, the Coalition publishes a newsletter that may cover recent developments in OJJDP and in the states, including model programs and approaches to juvenile treatment. In 1991 the Coalition expected to receive from the Office in excess of $574,000 for its activities, including its meetings, training sessions, technical assistance, and general operating expenses. Dues paid by members are another source of funds to defray these costs.

Despite what appears to have been the close relationship between OJJDP and the Coalition envisioned by Congress, the actual course of that evolving relationship has been characterized by periods of contentiousness rather than collaboration and cooperation. Annual proposals by the Reagan and Bush Administrations to eliminate the juvenile justice formula grant program have been a further source of friction.

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[45] *Id.* §5651(f)(2).

4. Technical Assistance Provider

With an amount not to exceed 2% of the appropriations for the formula grant program, the Administrator is directed to make grants to, or enter into contracts with, public or private entities for the purpose of providing technical assistance to states, local governments, and private agencies to facilitate compliance with the requirements of the formula grant program, including the three statutory mandates.[46] Funds available for these purposes since the 1989 fiscal year have approximated $1 million annually.

Needed technical assistance is either identified by participating state agencies in the 3-year plans submitted to the Office or ad hoc as the need arises in response to particular problems. Requests are processed through the OJJDP state representative. Community Research Associates, Inc. (CRA) of Champaign, Illinois has been the principal technical assistance (TA) provider, having won two competitive multi-year contract awards. CRA assistance often takes the form of suggestions on program options or facility design as well as the preparation and staging of training programs for state juvenile justice specialists and SAG members with regard to the formula grant program in general and compliance issues in particular.

At least in part because of the loss of experienced OJJDP state representatives over the last few years and rotations of personnel in and out of SRAD, CRA has had to assume the principal responsibility for technical assistance available to states struggling to achieve or maintain compliance with the statutory mandates. This is true despite the fact that the JJDP Act--along with various publications and other materials distributed by the Office--assumes that the Office itself will play a significant role in providing information and assistance to the states in deciding how to spend grant funds and to achieve compliance with the mandates.

5. The Coordinating Council on Juvenile Justice and Delinquency Prevention

This "independent organization in the executive branch" is composed of the Attorney General and the heads of various departments and agencies having responsibility for programs touching on the problems of juvenile crime and delinquency, including OJJDP.[47] The Attorney General is statutorily designated Chairman of the Council, with the Administrator of OJJDP serving as Vice Chairman.[48]

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[46] *Id.* §5631(b)(1).

The Council is responsible for coordinating "all Federal juvenile delinquency programs and all Federal programs relating to missing and exploited children."[49] It is also to make annual recommendations to the President and Congress with regard to "the coordination of overall policy and development of objectives and priorities for all Federal juvenile delinquency programs and activities."[50] Most importantly for present purposes, the Council is directed to "review the programs and practices of Federal agencies and report on the degree to which Federal agency funds are used for purposes which are consistent" with the statutory mandates of the JJDP Act, that is deinstitutionalization of status offenders, separation, and jail removal.[51]

Unlike the administrative structures previously surveyed, the Council has played an insignificant role in the formula grant program, despite the statutory requirement that it engage itself affirmatively in facilitating accomplishment of the goals of the JJDP Act. State officials interviewed as part of this study repeatedly observed that sizeable federal funds were being distributed to other parts of state government (or even other parts of the same agency) which might be, but were currently not being, used to serve both the purposes of the authorizing statutes and the purposes of the JJDP Act, including the accomplishment of deinstitutionalization, separation and jail removal.

6. Conclusions

The administrative superstructure for the formula grant program administered by OJJDP is complex. Complexity begets at least the potential for confusion, conflict, and misunderstanding. As this study will suggest, in the case of the JJDP Act this potential has been realized, though the success of the program in improving the system of juvenile justice has been, by many accounts, rather remarkable.

The discussions to follow in this study will describe the nature of the problems that have arisen. At least some of the perceived deficiencies in the Office's performance have found partial solution in the creation of institutions outside the Office, specifically the Coalition and the technical assistance provider. Dissemination of information relevant to promising programs for juvenile treatment--some importantly related to compliance with the statutory mandates--is performed today at least as much, if not more, by both of those nongovernmental entities rather than OJJDP. The same is true with regard to technical assistance to states.

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[47] *Id.* §5616(a)(1).

[48] *Id.* §5616(b).

[49] *Id.* §5616(c).

[50] *Id.*

[51] *Id.*

B. The Mandates

As noted at the outset of this report,[52] the purpose of this study is not to explore whether the three statutory mandates--deinstitutionalization of status offenders and nonoffenders (DSO), separation of juveniles and incarcerated adults, and jail removal--make sense as a matter of social policy. That issue has been and no doubt will be explored in great detail by others. It bears reiterating, however, as a matter of background that the mandates have been and remain a matter of controversy.[53]

For example, concern has been and still is expressed that deinstitutionalization of status offenders may merely swell the population of "runaways" and "throw-aways" to the detriment of both the public and the alleged "offenders" themselves.[54] Others fear that the DSO mandate will encourage police to unnecessarily charge juveniles with delinquent offenses in order to permit incarceration as a "treatment" or "protection" mode.[55] Alternatively, some juveniles whose behavior creates social problems may be unnecessarily committed by their parents or the courts to private mental health facilities rather than treated within the juvenile justice system.

In some states still out of compliance with the jail removal mandate, arguments have been made that co-located jail and juvenile facilities, which satisfy separation requirements but which may incorporate phased sharing of rooms and staff, make clear economic sense and fit conformably with the statutory jail removal mandate. After all, the argument goes, the real social concern should be conditions of confinement, not merely maximizing physical separation of adults and children.

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[52] See text following note 20 *supra*.

[53] With regard to DSO, *see, e.g.,*, Cox, *Study Debates Locking Up 'Status Offenders'*, The Los Angeles Daily Journal, Feb. 3, 1986, at p. 81, col. 1; Kearon, *Deinstitutionalization, Street Children, and the Coming AIDS Epidemic in the Adolescent Population*, 41(1) Juvenile and Family Court Journal 9 (1990); Logan & Rausch, *Why Deinstitutionalizing Status Offenders is Pointless*, 31(4) Crime and Delinquency 501 (1985) (focusing on Connecticut's DSO program); Read, *Deinstitutionalization of Status Offenders: A Look at the Debate*, 7 CHILDREN'S LEGAL RIGHTS JOURNAL, No. 2 at 1-5 (1986).

For a critical examination of the attempts to achieve the DSO mandate (including state resistance to compliance), *see* Costello & Worthington, *Incarcerating Status Offenders: Attempts to Circumvent the Juvenile Justice and Delinquency Prevention Act*, 16 HARV. C.R.-C.L. L. REV. 41 (1981). For another view of the DSO effort, *see* Sweet, *Deinstitutionalization of Status Offenders: In Perspective*, 18 PEPP. L. REV. 389 (1991) (written by the then incumbent OJJDP Administrator).

[54] See Kearon, *supra* note 53, at 9-10.

[55] See Read, *supra* note 53, at 3.

This argument is countered by others. It is maintained, for example, that a facility for juveniles that adequately serves their needs and conveys to them the appropriate rehabilitative messages will not be designed if it also houses adults within its walls or grounds because construction design and security will generally be based on the worst prisoner to be encountered. Alternatively, it is argued that maintenance of total separation through time-phasing in use of various areas is simply not possible on a consistent basis; and that staff trained to serve both juveniles and adults in different fashions will, as a matter of human nature, treat all prisoners alike, and not in ways appropriate for the juvenile population. According to this view, jail removal means, both as a matter of construction of the JJDP Act and good social policy, totally different facilities and staffs to serve incarcerated adults and children.[56]

Putting these debates aside, at least for the moment, it is clear that Congress determined and has continued in its beliefs that, *at a minimum*, status offenders and nonoffenders should not be securely held; that adults and juveniles should be separated when incarcerated in a single facility; and that, beyond separation, juveniles should not be detained or confined in adult jails or lockups.

Unfortunately, this rather general description of the mandates is not really adequate for the discussion that follows. Therefore, we must more carefully define the parameters of these mandates, including the exceptions to their scope and dates of final compliance. It should be noted that the mandates themselves have not remained entirely unchanged since 1974. Accordingly, it is important to examine the statutory evolution, in particular because OJJDP policy has at times found itself later incorporated in the legislative amendments.

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[56] For generally critical evaluation of progress on jail removal, *see* Frazier & Bishop, *Jailing Juveniles in Florida: The Dynamics of Compliance with a Sluggish Reform Initiative*, 36(4) CRIME AND DELINQUENCY 427 (1990) (noting criticism of OJJDP for failing to push hard for compliance and difficulties for states resulting from lack of necessary resources and alternatives); Schwartz, Harris & Levi, *The Jailing of Juveniles in Minnesota: A Case Study*, 34(2) CRIME AND DELINQUENCY 133 (1988).

For a general (and critical) treatment of the progress to date to improve juvenile jailing and treatment practices, *see* I. Schwartz, (In)Justice for Juveniles: Rethinking the Best Interest of the Child (1989) (the author was both one of the architects of the jail removal mandate and a former Administrator of OJJDP), reviewed by B. Krisberg, *The Politics of Juvenile Justice: Then and Now*, in 15 LAW & SOC. INQUIRY 893 (1990).

1. Deinstitutionalization

Enacted in 1974, this mandate requires that juveniles who are charged with or convicted of offenses which would not be criminal if committed by an adult, and nonoffenders (such as dependent or neglected children) may not be placed in secure detention or correctional facilities.[57] Secure facilities are defined to include public and private residential facilities which include "construction fixtures designed to physically restrict the movements and activities of juveniles or other individuals held in lawful custody . . . ."[58] Nonoffenders were brought within the scope of the mandate in 1977.

The perspective which, in part, set the stage for the enactment of the DSO mandate is captured by the following testimony delivered in February of 1973 by Allen F. Breed, then president of the National Association of State Juvenile Delinquency Program Administrators, to the Senate Subcommittee to Investigate Juvenile Delinquency:

> The structural and procedural system has two built-in patterns that tend to be self-defeating. First, the youth in need of trouble is identified and labeled. As he is labeled, certain sanctions are imposed and certain critical stances assumed. The sanctions and the stance tend to convince the individual that he is deviant, that he is different, and to confirm any doubts he may have had about his capacity to function in the manner of the majority.
>
> Second, as the label is more securely affixed, society's agencies (police, schools, etc.), lower their level of tolerance of any further deviance: the curfew violator who is an identified parolee or probationer may go into detention; the nonlabeled offender will frequently go home; and the misbehaving probationer will be remanded to the vice-principal's office faster than his nonprobation fellow. As these discriminations are made, the youth is further convinced of the difference and of society's discrimination.
>
> If the unacceptable behavior continues and the youngster penetrates further into the justice and correctional apparatus, he is subjected to an increasing degree of segregation from others of his kind--from special schools to detention to state correctional school--each step invites a greater identification

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[57] 42 U.S.C. §5633(a)(12)(A).

[58] *Id.* §5603(12)(A)(13)(A).

> with the subculture of the delinquent, and so, again, his anti-adult-antisocial-peer-oriented values are reinforced and confirmed, and the socializing conformity-producing influence of the majority society are removed further from him.
>
> Thus, as the state's "treatment" is intensified, so too is the rejection, both covert, and overt, and as we try harder to socialize the deviant, we remove him further from the normal socializing processes.
>
> Our objective must be, therefore, to minimize the youngster's penetration into all negative labeling, institutional processes. To this end, we must exploit all of the available alternatives at each decision point, i.e.,, suspension, expulsion, arrest, detention, court wardship, commitments, parole revocation. At each critical step, we should exhaust the less rejecting, the less stigmatizing recourses before taking the next expulsive step.[59]

Exempt from the mandate are juveniles who are charged with or convicted of violating "valid court orders,"[60] that is, "a court order given by a juvenile court judge to a juvenile who has been brought before the court and made subject to a court order" wherein the juvenile has, during the proceedings, been given all due process rights guaranteed by the Constitution.[61] This exemption was added in 1980, as a result of a floor amendment in the House introduced by John Ashbrook of Ohio. It was argued in its support that the JJDP Act

> has made it virtually impossible for juvenile courts to deal with chronic status offenders by denying the court its traditional discretionary power to enforce valid court orders involving these youth. Under current law, the court can remand a runaway person to a half-way house, or similar institution, and order the youth to stay put, but then be totally powerless to do anything when the youth runs out the back door. This allows young people to continually flout the will of the court, which not only breeds contempt and

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[59] S. Rep. No. 93-1011, 93d Cong., 2d Sess. at 221-22 (1974).

[60] 42 U.S.C. §5633(a)(12)(A).

[61] *Id.* §5603(16).

> disrespect for the courts, but only makes helping that young person much more difficult.[62]

The valid court order exception was controversial in its inception and remains so today. At the present time, the states differ in the degree to which they permit incarceration of juveniles based on their violation of court orders.[63] It was and is now seen by some as a significant erosion of the progress made under the deinstitutionalization mandate as enacted in 1974. For example, Congressman Kildee argued unsuccessfully in opposition that "[j]udges should use their expertise and knowledge to provide placements and treatments that will help a child overcome his or her problems and prevent that child from advancing from noncriminal to criminal activities. Incarceration is difficult to justify as either a treatment or a punishment."[64]

Not mentioned in the text of the statute is another "exception" to the seemingly absolute commands of the DSO mandate. That exception is found in congressional reports accompanying the 1977 amendments. Specifically, *accused* status offenders and nonoffenders may be held in secure detention for up to 24 hours after apprehension and 24 hours after initial court intake "for investigation purposes, for identification purposes, to allow return of proper custody to the juvenile's parents or guardian, or detention for a brief period of time under juvenile court authority in order to arrange for appropriate shelter care placement. . . ."[65] This was deemed to represent a "rule of reason"[66] which permitted states and the Office to adjust the statute to what were considered to be appropriate police and court practices. It was noted that such an "exception" would be particularly valuable in sparsely populated states like Alaska where shelter facilities might not be readily available.[67] As we will see, concern for the peculiar difficulties of rural areas in meeting the mandates finds its expression elsewhere in the statute. These concerns still remain strong.

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[62] 126 Congressional Record 30227 (Nov. 19, 1980) (statement of Rep. John Ashbrook).

[63] *See* General Accounting Office, Noncriminal Juvenile Detention: Detentions have been Reduced but Better Monitoring is Needed [hereinafter "GAO Valid Court Order Report"] (Draft) (April, 1991) at 23-24.

[64] 126 Congressional Record 30228 (Nov. 19, 1980) (statement of Rep. Dale Kildee).

[65] S. Rep. No. 95-165, 95th Cong., 1st Sess. at 60 (1977). *See also* H.R. Rep. No. 95-313, 95th Cong., 1st Sess. at 43 (1977). The "exception" does not apply to status offenders and nonoffenders following adjudication. *See* OJJDP Policy No. 89-1201 (April 1989), contained in Vol. 1 OJJDP Formula Grants Program Manual at 1.1.

[66] Senate Report, *supra* note 65, at 60.

[67] *Id.* at 61.

This 24 hour exception is less controversial than the valid court order. Yet today, as in 1977, the potential impact of even brief periods of incarceration for status offenders is worrisome for some.[68]

In 1977 the original 2-year deadline for full compliance with the DSO mandate was extended. Convinced that flexibility had to be provided to those states demonstrating good faith efforts to meet the mandate and also concerned that the prior level of funding of the Act had been lower than expected, Congress extended the deadline by 1 year.[69] In addition, it adopted OJJDP's definition of "substantial compliance" (in terms of a percentage) which had been utilized for grant nonrenewal/termination purposes.[70] Accordingly, the Administrator was authorized to allow a state up to two additional years beyond the initial three to achieve full compliance where the state had accomplished deinstitutionalization of not less than 75 percent of status offenders and nonoffenders and made an unequivocal commitment to achieving full compliance within a reasonable time not exceeding two additional years.[71]

This was the first, but not the last, time Congress would confront the dilemma posed by grant termination as a sanction for noncompliance with federal mandates. On the assumption that grant funds are being expended in ways that serve the mandates and substantive purposes of the JJDP Act, termination is suggestive of "cutting off one's nose to spite one's face." Inevitably, this dilemma creates strong incentives for accommodations of various types.[72] In the case of the JJDP Act, this has resulted in legislative extensions of the timeframes for full compliance, coupled with specific conditions imposed on extensions which attempt to guarantee further progress. Since the same dilemma confronts an agency administering such a program, it comes as no surprise that OJJDP has attempted, within what it believes are the statutory limits on its discretion, to use a combination of negotiation, ultimatum and administrative invention to move states along the road to full compliance.[73]

Not surprisingly, Congress ultimately provided further leeway for compliance with DSO. In 1980, it added an alternative to the 75 percent removal test for "substantial compliance." Specifically, removal of 100 percent of status and nonoffenders from secure *correctional* facilities (as opposed to both detention and correctional facilities) would justify up to a 2-year extension of the 3-year deadline for full compliance.[74] Secure *detention*, generally for shorter periods of time, was deemed less harmful to children than their being held for perhaps longer periods in correctional institutions.[75] Again, this was an attempted accommodation to good faith compliance efforts by states.[76]

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[68] *Id.*

[69] 42 U.S.C. §5633(c)(1).

[70] S. Rep. No. 95-165, 95 Cong., 1st Sess. at 60 (1977).

[71] *Id.*

[72] See Mason, *A Guide to Federal Grant Statute Drafting* at 108, in Administrative Conference of the United States, "Studies In Administrative Law and Procedure" 90-1.

[73] *Id. See generally* Gormley, *Food Fights: Regulatory Enforcement in a Federal System*, 52 PUB. ADMIN. REV. 271 (1992).

The 1980 amendments to the substantive DSO mandate were to be the last. The 1989 monitoring reports indicated that 42 participating states and other jurisdictions were either in full compliance with the DSO mandate, or in full compliance with de minimis exceptions, one was out of compliance, and data were not yet available for two others.[77]

2. Separation

The original JJDP Act established as a mandate that juveniles alleged or found to be *delinquent*[78] could not be detained or confined in any institution in which they had regular contact with adult incarcerated persons.[79] The only amendment to this came in 1977 when the separation provision was extended to cover status offenders and nonoffenders.[80]

By some accounts the DSO, rather than the separation, mandate was really the focus of Congress' concern in 1974 when the JJDP Act was enacted. No exemptions to the provisions of this mandate are found in the text of the statute. Its language is as absolute as that of the DSO and jail removal mandates and its phrasing is similar. Moreover, it is noteworthy among the mandates for its lack of any specific final compliance deadline. The absence of that deadline gives rise to two arguments: (1) that immediate compliance was expected; or (2) that the Office had discretion to allow states a "reasonable" period of time for full compliance taking into account the peculiar difficulties each state might have in meeting the mandate. As will be noted below,[81] the Office opted for the latter view. Congress has not expressly challenged (or approved) this by statutory amendment or otherwise.

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[74] H.R. Rep. No. 96-946, 96th Cong., 2d Sess. at 26-27 (1980).

[75] *Id.* at 27.

[76] *Id.*

[77] See Appendix C1, which is available upon request from the Conference.

[78] A delinquent, or criminal-type offender, is a juvenile offender who has been charged with or adjudicated for conduct which would, under the law of the jurisdiction in which the offense was committed, be a crime if committed by an adult. *See* 28 CFR §31.304(g) (1991).

[79] 42 U.S.C. §5633(a)(13).

[80] *Id.*

[81] See text at notes 124-27 *infra*.

Based on the state monitoring reports for 1989 submitted to OJJDP, 29 participating states and other jurisdictions were in full compliance with the separation mandate, 12 were in full compliance with permitted exceptions, 11 were not in compliance but showing progress, 1 was out of compliance, and data were unavailable from 3 others.[82] To a degree, the addition of the jail removal mandate in 1980 mooted the significance of the separation mandate. Compliance with jail removal means compliance with separation in many, though not all, instances.[83]

3. Jail Removal

Of all the legislation amending the mandate portion of the 1974 JJDP Act, perhaps none was more important than the requirement for jail removal.[84] That was added late in 1980, within 1 month of the end of the Carter Administration.

Congress established a 5-year deadline (that is, extending to December 1985), subject to some extensions, after which "no juvenile" was to be "detained or confined in any jail or lockup for adults." According to statistics and testimony presented at hearings, mere separation was not adequately protecting juveniles. Witnesses pointed to potential physical and sexual abuse encountered by youths incarcerated in adult jails and to youths kept in isolation. Moreover, the suicide rate for juveniles so incarcerated was approximately seven times the rate of children held in secure juvenile facilities. Developments in the area of constitutional law and the perception that jail removal was economically feasible added to the argument in favor of this new mandate.[85]

The House Committee on Education and Labor, where the jail removal provision originated, noted that the mandate did not apply (though the statute was not amended to say so expressly) to: (1) juveniles waived or transferred to criminal court by a juvenile court after criminal charges had been filed; or (2) juveniles over whom a criminal court had formally asserted its jurisdiction by the filing of criminal charges.[86] This was required because "[a]ppropriate alternative secure placements for serious and violent juvenile criminal offenders waived or bound over to adult court are often not available."[87] Congress hoped, however, that this approach would not encourage increased waivers of juveniles to criminal court or state redefinition of the scope of jurisdiction of their criminal courts,[88] developments which, however, were not entirely forestalled.[89]

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[82] See Appendix C2, which is available upon request from the Conference.

[83] *See, e.g.,*, text at notes 90-91 *infra*. But see text at note 400 *infra*.

[84] *See generally* Chung, *Kids Behind Bars: The Legality of Incarcerating Juveniles in Adult Jails*, 66 Ind. L.J. 999 (1991) (discussing, among other things, the problems facing juveniles in adult jails and the legal protections that apply, including the JJDP Act).

[85] H.R. Rep. No. 96-946, 96th Cong., 2d Sess. at 24 (1980).

[86] *Id.* at 25.

The Committee (and ultimately OJJDP)[90] defined in its report (but not in the statute) "jail or lockup for adults" as follows:

> For the purposes of this provision, a jail for adults is defined as a locked facility, administered by State, county, or local law enforcement and correctional agencies, the purpose of which is to detain adults charged with violating criminal law, pending trial. Also considered as adult jails are those facilities used to hold convicted adult criminal offenders sentenced for less than one year. . . . A lockup for adults is similar to a jail for adults except that it is generally a municipal or police facility of a temporary nature which does not hold persons after they have been formally charged.
>
> . . . [I]nstitutions and facilities that are used exclusively for the post-conviction or post-adjudication detention or confinement of offenders who have been convicted of crimes or adjudicated delinquent are not adult jails or lockups. Juveniles adjudicated delinquent, if confined in an institution that incarcerates adult criminal offenders, would continue to have to be separated from regular contact with adults in order for the State to be in compliance with the . . . separation requirement.[91]

In other words, technically the jail removal mandate applies only to facilities holding adults pending adjudication and to facilities holding convicted adults for less than a year, which are the kind of facilities where problems had been identified. Excluded are long-term confinement facilities where both juveniles and adults may be held. They are few in number and are covered by the separation mandate.

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[87] *Id.*

[88] *Id.*

[89] See text at note 389 *infra*.

[90] 28 CFR §31.304(m), (n) (1991).

[91] House Report, *supra* note 85, at 25-26.

As in the case of DSO, the Committee noted in its Report (but not in the text of the legislation) that it expected OJJDP to follow a "rule of reason" in administering this mandate. Specifically, the Office could:

> permit the temporary holding in an adult jail or lockup by police of juveniles arrested for committing an act which would be a crime if committed by an adult for purposes of identification, processing, and transfer to juvenile court officials or juvenile shelter or detention facilities. Any such holding of juveniles should be limited to the absolute minimum time necessary to complete this action, not to exceed six hours, but in no case overnight. Section 223(a)(13) [the separation mandate] would prohibit such juveniles who are delinquent offenders from having regular contact with adult offenders during this brief holding period.[92]

In other words, *accused* delinquent offenders (but not status offenders or nonoffenders) could be held in adult jails and lockups for up to 6 hours as long as there was adequate separation.[93]

From the beginning Congress realized that the states might have difficulties in complying with the 5-year deadline for full compliance. Analogously to the DSO mandate, it defined in 1980 "substantial compliance" with the mandate--which would permit continued funding--as the achievement of at least 75% removal of juveniles from jails and lockups for adults. It permitted an up to 2-year delay beyond 1985 for final compliance where a state made the 75% showing along with an unequivocal commitment to achieving full compliance within that additional 2-year period.[94]

Despite the committee provision for a 6-hour "hold" and the provision for some extension of the deadlines, concerns remained in 1980 regarding the ability of rural areas to meet the jail removal requirement in view of the economic costs of compliance and the existing lack of alternative placements in such areas. Representative Tom Coleman of Missouri proposed an amendment, which was adopted, providing that, with regard to sparsely populated areas, the OJJDP could permit the temporary holding of juveniles accused of serious offenses where no suitable alternative placement was available and separation was provided for.[95]

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[92] *Id.* at 26.

[93] Adjudicated delinquents may not be held for any length of time in adult jails or lockups. *See* OJJDP Policy 89-1401 (April 1989), Vol. 1 OJJDP Formula Grants Program Manual at 1.6-1.7.

[94] House Report, *supra* note 85, at 24.

In 1984 this rather open-ended "rural" exception was tightened up by limiting the Administrator's authority to grant relief to rural areas to the period "through 1989." The amendment also specified that only accused nonstatus offenders could be held in adult jails and lockups under this exception and only when they were "awaiting an initial court appearance pursuant to an enforceable state law requiring such appearances within 24 hours after being taken into custody (excluding weekends and holidays) provided that such exceptions are limited to areas which--(i) are outside a Standard Metropolitan Statistical Area (MSA), (ii) have no existing acceptable alternative placement available, and (iii) are in compliance with the provisions of paragraph (13) [separation]."[96]

In 1988 the use of this so-called nonMSA exception was extended "through 1993."[97] This extension of time was, moreover, part of a broader revision of the deadlines for full compliance with the jail removal mandate. Those changes were again deemed necessary to permit state flexibility and take account of good faith efforts by states to comply.

First, in 1984, the original provision for "substantial compliance" was amended to permit a 3-, rather than a 2-year period for coming into full compliance.[98] Then in 1988 Congress added an alternative definition of "substantial compliance" along with a waiver provision.

The new "substantial compliance" standard was designed to take into account the fact that a state might not be able to show a 75% reduction in holding juveniles in adult facilities from the 1980 baseline because, for example, it had prior to 1980 removed many juveniles from jails and lockups and the type left required secure holding facilities that were not yet available. This perceived unfairness, it was argued, demanded an alternative standard. The one enacted required that all juvenile status offenders and nonoffenders have been removed from jails and lockups for adults; meaningful progress has been demonstrated by the state in removing other juveniles from jails and lockups; and that the state has "diligently" carried out its plan to comply with the jail removal mandate, and has "historically expended, and continues to expend, to comply with [the jail removal mandate] an appropriate and significant share of the funds received by the State under this [Act]."[99]

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[95] 126 Congressional Record 30224-5 (November 19, 1980) (statement by Rep. Thomas Coleman).

[96] *See* 42 U.S.C. §5633(a)(14).

[97] *Id.*

[98] S. Rep. No. 98-499, 98th Cong., 2d Sess. at 26 (1984).

[99] 42 U.S.C. §5633(c)(2)(A)(i)(II), (4).

Both substantial compliance standards were statutorily tied to the 3-year limit on the extension of the 1985 deadline for full compliance. For all intents and purposes, therefore, the new alternative standard for substantial compliance had a very limited lifetime. Absent reliance on a waiver or nonMSA exception, states had to be in final, full compliance after December 1988 at the latest.

Eligibility for waiver was not so restricted. The 1988 amendment permitted waivers when substantial compliance was not achieved (that is, during the period prior to December 1988)[100] as well as after the date for compliance with the jail removal mandate.[101] No express limit on the number of waivers was specified in the statute nor was there any explicit statutory requirement that the state demonstrate that it had achieved substantial progress or that it promise to achieve such progress in the future. However, the legislative history indicated Congress' expectation that a waiver would be granted only when the noncompliant state had made significant progress and additional funding would likely produce further progress toward full compliance.[102] The only explicit textual condition on the waiver was that the recipient state agree to expend all of the funds to be received, with minor exceptions,[103] to achieve compliance with the jail removal mandate.

In sum, generally speaking, states were required to come into full compliance with the jail removal mandate by December 1988, with the exception of "rural areas" which have additional flexibility through 1993. Aside from demonstrated full compliance, continued eligibility for funding depended on a state's being found in "substantial" compliance or having received a waiver in the interim after 1985. If compliance data indicated the failure to achieve full compliance after December 1988, only a waiver could permit further eligibility for funding.

Based on the 1989 monitoring reports submitted by the states to OJJDP, 7 participating states and other jurisdictions were in full compliance, 32 were in full compliance with de minimis exceptions, 6 were not in compliance but with a waiver granted, 5 were not in compliance but waiver eligible, 3 were out of compliance with waiver denied, and data were not available from 3 others.[104]

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[100] 42 U.S.C. §5633(c)(2).

[101] *Id.* §5633(c)(3).

[102] H.R. Rep. No. 100-605, 100th Cong., 2d Sess. at 11-12 (1988).

[103] 42 U.S.C. §5633(c)(2)(B), (3) (other than those to be used for administrative purposes, to support the SAG, and for Indian tribe compliance with the mandates).

[104] See Appendix C3. *See also* Appendix B, which indicates the number of waivers granted to various states. Both Appendices are available upon request from the Conference.

4. Monitoring

In 1974 Congress required that participating states have adequate systems to monitor for compliance with what were then the two statutory mandates--deinstitutionalization of status offenders and separation of adults and juveniles--and to report annually the results of such monitoring to the Administrator. With the addition of the jail removal mandate in 1980, the requirements for state monitoring and reporting were extended to it. However, Congress provided that the annual compliance reports to OJJDP need not be provided in certain limited circumstances. As explained in 1980 by the House Committee on Education and Labor, its bill also provides that

> annual monitoring report requirements shall not apply to States which are fully in compliance with the deinstitutionalization, separation, *and removal-from-adult-jail* requirements and which have enacted State legislation which conforms to those requirements and which, in the opinion of the Administrator, contain [sic] sufficient enforcement mechanisms to insure that the legislation will be administered effectively. The intent of the committee is to reduce paperwork, to provide an additional incentive for full compliance, and to encourage States to pass State legislation which conforms to the requirements of the act.[105]

In contrast to the House Committee Report, however, the text of the 1980 amendment[106] unaccountably omits compliance with the jail removal mandate as a condition for waiver of the annual monitoring reports which are supposed to cover all three substantive mandates. As we will see,[107] OJJDP has in only one instance permitted a State not to submit annual monitoring reports. That experience proved so disastrous that it is unlikely that such permission will (or should) be granted in the future.

A study by the General Accounting Office prompted an amendment to the statute in 1984 that requires that OJJDP provide for the auditing of state monitoring systems for the purpose of determining their adequacy in ascertaining the status of compliance with the mandates. The House Committee on Education and Labor noted that it had "assumed it to be obvious that the Congress, by requiring these systems as part of a State plan, intended for the Administrator to review them for adequacy."[108] However the GAO's study indicated that the Office did not in fact evaluate the reliability and validity of the data supplied by the states and that state reports were often based on inaccurate and incomplete local records.[109]

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[105] H.R. Rep. No. 96-946, 96th Cong., 2d Sess. at 26 (1980) (emphasis added).

[106] *See* 42 U.S.C. §5633(a)(15).

[107] See text following note 340 *infra*.

[108] H.R. Rep. No. 98-741, 98th Cong., 2d Sess. at 19 (1984).

5. A Note on Statutory Structure as it Relates to the Mandates and Grant Termination and Ineligibility

The mandates themselves are contained in the provisions of Section 223 of the JJDP Act, which sets forth the requirements for an acceptable state plan. That plan is required "in order [for a state] to receive formula grant funds under this part."[110] Such plans must "provide" that, within the timeframes established by Congress, status offenders "shall not be" placed in secure institutions; that juveniles "shall not be detained or confined" in institutions incarcerating adults without adequate separation; that "no juvenile shall be detained or confined in any jail or lockup for adults" (except for rural areas); and "for an adequate system of monitoring jails, detention facilities, correctional facilities, and nonsecure facilities to ensure" that the foregoing three mandates are met.[111]

Other than the nonMSA exception, provisions for extension of the final compliance dates (i.e., the alternative "substantial" compliance standards for DSO and jail removal along with the waiver provisions for jail removal) are included in a different part of Section 223, which provides not for a termination of an outstanding grant but noneligibility for future receipt of grants.[112]

The JJDP Act contemplates the possibility that, during the term of a particular year's formula grant, a state might so fail to carry out its plan that some sanction might be warranted. Accordingly, the Administrator is authorized, after notice and hearing at which he finds that a state has failed to comply "substantially with any provision of this title," to withhold grant funds.[113]

Also, in determining eligibility for new formula grant awards, the Administrator must provide the opportunity for an on-the-record hearing with respect to alleged failures of a state to submit a plan that meets statutory requirements, including alleged noncompliance with one or more of the mandates.[114] The standard for a determination of ineligibility is "substantial" failure to comply.[115] In a case where such a finding has been made, OJJDP must "endeavor to make [the noncomplying] State's allotment . . . available to local public and private nonprofit agencies within such State for use in carrying out" the mandates.[116]

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[109] *Id.*

[110] 42 U.S.C. §5633(a).

[111] *Id.* §5633(a)(12)(A), (13), (14), (15).

[112] *Id.* §5633(c)(1)-(4).

[113] 42 U.S.C. §5673.

[114] *Id.* §3783, §5633(d).

To date, mid-grant terminations, along with formal and final determinations of ineligibility under these provisions--while threatened in some instances--have not taken place.

C. Regulatory Elaboration of Statutory Requirements

1. Overview

Many of the rules governing the formula grant program are found in Part 31 of Title 28 of the Code of Federal Regulations.[117] These are legislative regulations, that is to say, rules promulgated by OJJDP pursuant to the legislative grants of rulemaking authority contained or referred to in Sections 201(b), 223(a), and 292(d) of the JJDP Act.[118] Those rules have the force and effect of law.[119]

Part 31 covers a multitude of areas, including the submission date for formula grant applications, the designation and composition of the SAGs, the content of the 3-year plans describing the barriers to compliance with the statutory mandates and the program for achieving full compliance and for monitoring for compliance, the content of annual monitoring reports, definitions of "full" and "substantial" compliance, conditions for a jail removal compliance waiver, requirements for annual performance reports, and applicable definitions.

Many of these rules repeat largely verbatim the requirements found in the statute. In important respects, however, some go beyond the statutory text, sometimes picking up language found in congressional reports accompanying amendments to the JJDP Act.

The Office has not, however, restricted its interpretation of the JJDP Act and its policymaking thereunder to legislative rules. At various times, it has issued nonlegislative[120] policy statements and interpretations. While some of these have later ended up as or been referred to in OJJDP's legislative rules, others have not.

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[115] 28 CFR §§18.1, 18.2, 18.5 (1991).

[116] 42 U.S.C. §5633(d).

[117] 28 CFR Part 31 (1991).

[118] 42 U.S.C. §§5611(b), 5633(a) and 5672(d).

[119] *See* Memorandum from Charles A. Lauer, Office of General Counsel to Alfred S. Regnery, Acting Administrator, OJJDP (February 8, 1983).

In selected instances the Office has published proposed nonlegislative statements for comment in the Federal Register. More often, as issues of policy and interpretation have arisen during the day-to-day administration of the formula grant program, they have been resolved without invoking a formal consultation process with interested parties and the public at large. What have been deemed to be the most important and currently relevant nonlegislative statements appear now in two staff manuals,[121] which were issued in 1989 and 1990 and distributed to OJJDP state representatives and state juvenile justice specialists. Those manuals were intended both as a training and reference tool and to be updated on a regular basis (the latter of which seems not to have occurred with great regularity).

What follows is a relatively brief overview of the Office's regulatory elaboration of the statutory mandates, including the provisions defining levels of "compliance," conditions for waiver, and monitoring requirements. Tables 2 and 3 summarize the various statutory and administrative "exceptions" to the mandates and the provisions for extension of final compliance dates.[122]

2. The Separation Mandate

The statutory prohibition of "regular" contact between juveniles and incarcerated adults is defined "as sight and sound contact with incarcerated adults . . . . This prohibition seeks as complete a separation as possible and permits no more than haphazard or accidental contact . . . ."[123]

As noted above,[124] despite the similarity in textual phrasing of this mandate to the others and the presence of explicit congressional timeframes for DSO and jail removal, the Office has not interpreted the separation provision to require immediate compliance in all cases, apparently on the basis that that would be "unreasonable." Accordingly, states have been afforded a great deal of flexibility here. The relevant regulation notes as follows:

> The requirement of this provision is to be planned and implemented immediately by each State in light of identified

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[120] Nonlegislative rules lack the legal effect of a statute. *See, e.g.*,, A. Bonfield & M. Asimow, State and Federal Administrative Law 405-418 (1989).

[121] OJJDP Formula Grants Program Manual, Vols. 1 & 2 (1989, 1990).

[122] *See* Mason, *supra* note 72, at 86, 126 (noting that "exception" mechanisms are desirable in grant statutes).

[123] 28 CFR §31.303(d)(1)(i) (1991).

[124] See text at note 81 *supra*.

> constraints on immediate implementation. Immediate compliance is required where no constraints exist. Where constraints exist, the designated date of compliance in the latest approved plan is the compliance deadline. Those States not in compliance must show annual progress toward achieving compliance until compliance is reached.[125]

This potentially leaves some room for the Office to second-guess the compliance deadline established by the States, as, for example, where the Office deems that no constraints on compliance exist.[126] However, in practice the Office appears to defer largely to state judgment. State plans must "justify any deviation from a previously approved timetable."[127]

Full compliance with the mandate is deemed to occur when monitoring reports indicate no instance where a juvenile has been held in violation of the statutory separation requirement. Alternatively, the Office has established a regulatory standard which permits some holding in violation of the separation mandate and yet a finding of compliance. Specifically, OJJDP will deem compliance to have been achieved as long as state law or policy prohibits holding juveniles in cases where the requisite separation is not present; all instances of noncompliance reported in the last submitted monitoring report were in violation of that state law or policy; such instances do not indicate a pattern or practice; and existing mechanisms for the enforcement of state law or policy are such that the instances are unlikely to reoccur.[128]

This standard is purely a regulatory creation with no express basis in the statute. As we will see, it is similar in certain respects to so-called "de minimis" standards developed by the Office for the DSO and jail removal mandates.[129] Given the general notions underlying the concept of de minimis, it could be considered itself a de minimis standard.

Finally, it should be noted that juveniles who are waived or transferred to criminal court or who are otherwise charged with a criminal act are not deemed to be within the protection of the separation mandate since they are not status offenders or delinquents.[130]

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[125] 28 CFR §31.303(d)(2) (1991).

[126] Legal Opinion No. 76.7--State Plan Requirements of 223(a)(12)-(14) of the Juvenile Justice Act--October 7, 1975, contained in Vol. 2 OJJDP Formula Grants Program Manual at C-21.1-21.4.

[127] 28 CFR §31.303(d)(1)(i) (1991).

[128] *Id.* §31.303(f)(6) (1991).

[129] See text at notes 173, 182 *infra*.

[130] Policy No. 89-1301 (April 1989), contained in Vol. I OJJDP Formula Grants Program Manual at 1.5.

Table 2

EXCEPTIONS RELIED UPON IN DETERMINING COMPLIANCE WITH MANDATES

SOURCE

	JJDP Act	Legislative History	Administrative
DSO	valid court order	24 hour holding period	de minimis full compliance standards
Separation	n/a	n/a	violations of state law
Jail/Lockout Removal	non-MSA 24 hour exception (available through 1993)	6 hour holding period	de minimis full compliance standards; non-secure custody policy

Table 3

COMPLIANCE DEADLINES AND MECHANISMS FOR EXTENSION

	Initial Deadlines for full Compliance	Extensions Available	Basis for Extensions
DSO	Three years from start of participation	up to 2 years	numerical substantial compliance standards[1]
Separation	"reasonable" time	n/a	n/a
Jail/Lockout Removal	1985	up to 3 years (to December 1988) unless a waiver	numerical[2] and non-numerical[3] substantial compliance standards; or waiver[4]

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[1] 75% removal of status offenders and nonoffenders from secure facilities or 100% removal from correctional facilities.

[2] 75% removal.

[3] 100% removal of status offenders; meaningful progress; diligence in carrying out removal plan; significant share of grant funds used for jail removal.

[4] No statutory limit on number but regulations limit to three.

3. Valid Court Order Exception to DSO

The statutory language which permits secure holding of juveniles for violations of "valid court orders,"[131] along with the definition of "valid court orders,"[132] leave many questions unanswered regarding the scope of this exception to the DSO mandate. After an extended public comment process during 1981-82 which followed the legislative adoption of the exception in 1980, the Office arrived at a definition which purportedly reflects both the statutory text, legislative background, and policy concerns.[133]

Briefly stated, in order for secure incarceration of a status offender to occur consistent with the DSO mandate, the following must take place: the juvenile must have originally been brought before a court of competent jurisdiction and made subject to a legally issued order regulating his or her future conduct; the order must have been entered in accord with established law, the facts and proper procedures; the juvenile and his or her attorney must have been warned of the consequences of violation at the time the order was issued; after apprehension for violation of the order, a probable cause hearing must occur within 24 hours and a final hearing should occur within 72 hours if the alleged offender is held securely in the meantime; the violation hearing must accord the juvenile all his or her due process rights; and the judges presiding at the probable cause and violation hearings must ascertain that the foregoing requirements have been met.[134] A juvenile found, after the requisite hearing, to have violated a valid court order may be placed in a secure detention or correctional facility after the judge determines that there is no less restrictive alternative appropriate.[135] Nonoffenders such as neglected children cannot be placed in secure detention for violation of valid court orders.[136]

4. Separate Facility Within a Jail or Lockup

Inevitably the question arose regarding how the jail removal mandate applied when juveniles were held in the same building or on the same grounds as adults.

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[131] 42 U.S.C. §5633(a)(12)(A).

[132] *Id.* §5603(16).

[133] *See* 47 Fed. Reg. 35686-7 (Aug. 16, 1982).

[134] 28 CFR §303(f)(3)(i)-(vi) (1991).

[135] *Id.* §31.303(f)(3)(vi) (1991).

[136] *Id.* §31.303(f)(3)(vii) (1991).

a. "Separateness"

In January 1984 the Office published what it called a "position statement" in the Federal Register, apparently in final form without first utilizing a formal notice-and-comment process.[137] The announcement set forth four "mandatory requirements," along with a nonexclusive list of factors to be utilized to determine whether those requirements were met, all to be applied "to determine acceptability in the event both juveniles and adults are detained in one physical structure."[138]

Briefly stated, according to the "mandatory" part of the test, part of a building housing an adult jail or lockup could be utilized, consistent with the jail removal mandate, to house juveniles if there was "[t]otal separation between juvenile and adult facility spatial areas such that there could be no haphazard or accidental contact between juvenile and adult residents;" "[t]otal separation in all juvenile and adult program activities;" "[s]eparate juvenile and adult staff, including management, security staff, and direct care staff;" and "[i]n states that have established state standards or licensing requirements for secure juvenile detention facilities, the juvenile facility meets the standards and is licensed as appropriate."[139]

The listed "factors" included that "[j]uvenile staff are employee [sic] full-time by a juvenile service agency or the juvenile court with responsibility only for the conduct of the youth-serving operations" and "[j]uveniles do not share direct service or access space with adult offenders."

What is curious about the "factors" is the degree to which they seem, in large degree, to restate the requirements for "total separation" contained in the "mandatory" aspect of this "position statement" without adding much new. While perhaps not intended, the message that might be conveyed is that the "mandatory requirements" are not as clearcut as they appear to be on the surface since the nonexclusive list of factors bespeaks administrative discretion to deal with cases in somewhat of an ad hoc basis. This is not the only possible meaning, however, for the factors could be taken as emphasizing that spatial areas may not be shared at any time and for any purpose and that the staff members must be dedicated exclusively to different incarcerated populations.

The four mandatory criteria, but not the factors, were incorporated in the Office's formula grant regulations in June 1985.[140] One of the objectors to their inclusion argued that, to qualify as a separate facility, a place of juvenile detention should not share any common wall or roof with an adult jail or lockup.[141] The Office rejected that position.

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[137] 49 Fed. Reg. 2054 (Jan. 17, 1984).

[138] *Id.*

[139] *Id.*

[140] See 50 Fed. Reg. 25553 (June 20, 1985).

Finally, during 1988 to 1991 the Office revisited this issue in the context of Wisconsin's continued participation in the formula grant program. That episode will be more elaborately discussed below.[142] It suffices for present purposes to note that in July 1991, without engaging in a public comment process, the Office issued what it called a "clarification" of the four separation requirements. More specifically, the Office approved time-phasing of the use of spatial areas for both juveniles and adults where there were adequate protections against "haphazard or accidental contact." Also approved was the use of the same security staff to serve both populations. The staff must be trained to serve the special needs of juveniles and the same staff persons cannot serve both populations at the same time or during the same shift.[143]

This "clarification," which was issued as an "OJJDP policy" not published in the Federal Register but distributed for inclusion in the agency's staff manual, was an attempt to afford more flexibility to states having special problems.[144] However, questions have been raised by various state and other officials regarding the effectiveness of operational plans to ensure separation as well as the ability of guards to wear "two hats" and not treat juveniles in the same way they treat adults.[145]

b. "Nonsecure Custody"

Following the issuance of the "separateness" definition in 1984, the Office issued another policy statement dealing with what it called "nonsecure" custody. This appeared in final form, following opportunity for comment, in the Federal Register of November 2, 1988.[146] The Office noted that state and local officials "are often called upon to identify alternatives to holding juveniles in jail cells or lockups while law enforcement officers carry out their responsibilities of identification, investigation, processing, release to parent(s) or guardian, hold for transfer to an appropriate juvenile detention or shelter facility, or transfer to court." During this "interim" period, a balance must purportedly be struck between the "statutory objective" of jail removal and the need to avoid disruption of police operations.[147] Accordingly, the Office identified the circumstances in which it would deem a juvenile who was held in a facility housing an adult jail or lockup as being in a nonsecure custody status, and therefore, according to the Office, not to be considered as detained "in a jail or lockup" for monitoring purposes. Specifically, a juvenile could be held in "an unlocked, multi-purpose area . . . which is not designated, set aside or used as a secure detention area" or "if a secure area, is used only for processing purposes." That area must be "limited to providing nonsecure custody only long enough and for the purposes of identification, investigation, processing, release to parents, or arranging transfer to an appropriate juvenile facility or to court" and cannot be "designated or intended to be used for residential purposes." Moreover, the juvenile cannot be "physically secured to a cuffing rail or other stationary object" and "must be under continuous visual supervision by a law enforcement officer or facility staff during the period of time he or she is in nonsecure custody."[148] During the period the juvenile is in nonsecure custody, the statutory separation requirement is deemed inapplicable.[149]

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[141] *Id.*

[142] See text at notes 315-28 *infra*.

[143] OJJDP Policy 91-1401 (July 1991), to be contained in Vol. 1 OJJDP Formula Grants Program Manual.

[144] Letter from Robert W. Sweet, Jr., Administrator OJJDP, to A.C. Carlisle, Associate Commissioner, Maine Department of Corrections (March 27, 1991).

[145] See text following note 55 *supra*.

[146] 53 Fed. Reg. 44366 (Nov. 2, 1988).

One of the principal differences between the "separateness" definition and the "nonsecure" holding policy is that the latter is directed in large degree to *temporary*, nonresidential holding and processing of juveniles in facilities housing adult jails and lockups. It is a concession to the needs of operating various police facilities. The former is related more generally to institutional design for short-term secure *residential* arrangements. The "separateness" definition is now part of the Office's legislative regulations, while the "nonsecure" policy statement is not. As to both, however, the Office's approaches are not rooted in legislative history, unlike some other positions taken by the Office like the 6 and 24 hour holds.[150]

5. Substantial Compliance

It is a reasonably well-established principle of federal grant law, which is expressly adopted in the JJDP Act, that ineligibility for funding or withholding of funds follows not every violation of federal grant conditions, but only "substantial" violations.[151] As noted above, first the Office and then Congress purported to define "substantial" compliance with the DSO mandate.[152] The "75 percent" removal standard, first applied to DSO, was extended by Congress in 1980 to the jail removal mandate.

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[147] *Id.*

[148] *Id.* at 44367.

[149] *Id.*

[150] See text at notes 65-68 and 92-93 *supra*.

[151] R. Cappalli, Federal Grants and Cooperative Agreements §8.07 (1982). *See also* text at notes 113-15 *supra*.

In 1988 Congress added the alternative standard of "substantial" compliance for jail removal purposes.[153] The Office elaborated on this in its legislative regulations. For example, no status offender or nonoffender could be incarcerated in a jail or lockup for any period of time (even the 24 hours generally permitted for secure facilities[154]) unless the incarceration was in violation of state law and did not constitute a pattern or practice.[155] The statutory standard of "meaningful progress" in removing other juveniles was defined as a "significant reduction" judged by several alternative measures of improvement (e.g., hours of confinement, number of offenders).[156] The legislative requirement of a "significant" expenditure of grant funds for jail removal purposes was defined to be no less than 40 percent except in certain circumstances.[157] These administrative interpretations of the statute, even if not required by the text, would appear to be supported by the fact that determining "substantial" compliance in particular cases is expressly vested in the Administrator's "discretion."[158]

Since Congress specifically defined "substantial" compliance with regard to all but the separation mandate, it might be argued for DSO and jail removal purposes that, following the periods during which the various substantial compliance standards apply, *any* nonexcepted instance of secure incarceration of a status offender or jailing of a juvenile constituted "substantial" noncompliance. (Exceptions include the valid court order, nonMSA, and limited holding period exceptions.)

The availability of a jail removal waiver, as it is provided by the JJDP Act, does not deal with problems of this type since such instances of noncompliance are likely to be recurring given mistakes, oversights, and unavoidable situations in which holding is deemed necessary to avoid disruptions of police operations or to protect the juvenile. Yet termination of a grant for what might be viewed as "trivial" violations, with the repercussions that would have for valuable treatment and other programs funded by federal dollars and for federal/state relations generally, suggests that there should be a method to accommodate these occurrences. Against this background, the Office developed the concept of "full compliance with de minimis exceptions," which will be discussed below.[159]

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[152] See text at notes 70-76 *supra*.

[153] See text at note 98-99 *supra*.

[154] See text at notes 65-68 *supra*.

[155] 28 CFR §31.303(f)(6)(iii)(A)(2)(i) (1991).

[156] 28 CFR §31.303(f)(6)(iii)(A)(ii) (1991).

[157] 28 CFR §31.303(f)(6)(iii)(A)(iv) (1991).

[158] 42 U.S.C. §5633(c)(2)(A).

6. Waiver

Finally, with regard to jail removal waiver, the Office added to the statutory conditions for obtaining that type of relief from the sanction of grant ineligibility. These additions are found in the agency's published legislative regulations. All the statute expressly requires is a state's agreement to dedicate all formula grant funds to jail removal.[160] Granting a waiver is discretionary with the Administrator.[161] Therefore, it would appear perfectly consistent with the statute for the Office to impose additional conditions.[162] One of the most important of these is the three-waiver limit.[163] Beyond that, OJJDP created a somewhat different set of conditions for granting a waiver where substantial compliance was not achieved (that is, for the period before December 1988) and for periods thereafter.

Beyond the statutory requirement of use of all formula grant funds for jail removal, under the Office's regulations a waiver where substantial compliance had not been achieved required that the state have "diligently" carried out its jail removal plan; have submitted an acceptable plan to eliminate "noncompliant incidents;" have "achieved" compliance with the requirements of the statute for an adequate monitoring system; and have demonstrated a commitment to achieve full compliance with the jail removal mandate.[164] For a waiver from the full compliance deadline of 1988, the state must have done or pledged to do all those things required for a waiver where substantial compliance had not been achieved and, in addition, have removed all status and nonoffenders from adult jails and lockups and made "meaningful progress" in removing other juvenile offenders from adult jails and lockups.[165] One way to synopsize the conditions for a waiver is that the state have demonstrated a good faith effort at compliance in the past and that it also provide OJJDP with a promise--backed by the will and a plan--to achieve compliance in the near future. These also characterize eligibility under the JJDP Act for extension of compliance deadlines on the basis of "substantial" compliance.[166]

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[159] See text at notes 170-87 *infra*.

[160] 42 U.S.C. §5633(c)(2)(B), (3).

[161] *See* H.R. Rep. No. 100-605, 100th Cong., 2d Sess. at 11-12 (1988).

[162] 28 CFR §303(f)(6)(iii)(D) (1991).

[163] *Id.* §303(f)(6)(iii)(E) (1991).

[164] *Id.* §303(f)(6)(iii)(D)(1) (1991).

[165] *Id.* §303(f)(6)(iii)(D)(2) (1991).

[166] *See, e.g.,*, text at note 98-99 *supra*.

7. De Minimis Exceptions

The Scylla of grant termination (with the effect of extinguishing important state efforts in the juvenile justice area) and the Charybdis of countenancing disregard of the statutory mandates (which, at a minimum, would have provoked considerable congressional ire) created the necessary motivation in the Office for the creation of the "de minimis" concept for judging compliance efforts. First fleetingly referred to in a legal opinion to the LEAA Regional Administrator for Region III in October 1976,[167] the Office applied the concept to the DSO mandate in 1981[168] and then to the jail removal mandate in 1985[169] with a revision following in 1988.[170] Being its initial foray into the area of defining departures from full compliance which were deemed "of slight consequence or insignificant,"[171] the Office adopted a rather elaborate policy statement on DSO. It did so after notice-and-comment rulemaking. The statement is today referred to, but not apparently incorporated by reference in, the legislative rules of the Office.[172]

The Office announced that it would "consider each case on its merits" based on three general criteria: the extent to which noncompliance "is insignificant or of slight consequence in terms of the total juvenile population in the State" (Criterion A); "[t]he extent to which the instances of noncompliance were in apparent violation of State law or established executive or judicial policy" (Criterion B); and "[t]he extent to which an acceptable plan has been developed which is designed to eliminate the noncompliant incidents within a reasonable time." (Criterion C).[173]

Of particular significance, moreover, is the Office's position that de minimis levels of noncompliance are considered but a waystation toward 100% compliance, though it is also clear that they can be applied to protect a state's continued funding in the case of occasional backsliding due to circumstances beyond its control.[174] The Office noted that it "deems it to be of critical importance that all states seeking a finding of full compliance with de minimis exceptions demonstrate progress toward 100 percent compliance and continue to demonstrate progress annually in order to be eligible for a finding of full compliance with de minimis exceptions."[175]

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[167] Legal Opinion No. 76-7--State Plan Requirements of Section 223(a)(12)-(14) of the Juvenile Justice Act--October 7, 1975, contained in Vol. II OJJDP Formula Grants Program Manual at C-21.1-21.4.

[168] 46 Fed. Reg. 2566 (Jan. 9, 1981).

[169] 50 Fed. Reg. 25551 (June 20, 1985).

[170] 53 Fed. Reg. 44370 (Nov. 2, 1988).

[171] 46 Fed. Reg. 2566.

[172] 28 CFR §303(f)(6)(i) (1991).

[173] 46 Fed. Reg. 2567-68.

[174] See text at note 291 *infra*.

What makes for some complication in the application of this policy statement is that the three criteria do not operate independently. Rather the first is broken down into statistical levels of DSO noncompliance (i.e., an institutionalization rate per year of less than 5.8 per 100,000 population under age 18, a rate between 5.8 and 17.6, a rate between 17.6 and 29.4, and finally a rate in excess of 29.4). The ranking of a state on this scale determines the degree to which a state must satisfy Criteria B and C (e.g., "adequately" rather than "fully"). The lower the state's own noncompliance rate the less the relevance of the other criteria. Moreover, a rate in excess of 29.4 does not entirely disqualify a state from being found in "de minimis" noncompliance if the state can point to "exceptional circumstances," including the presence in secure facilities of out-of-state runaways or federal wards or a recent change in state law which promises "substantial, significant, and positive impact on the State's compliance with the deinstitutionalization requirement within a reasonable period of time."[176]

The statistical measures were arrived at by determining the average annual rate for the eight states having both the smallest institutionalization rate per 100,000 population under age 18 and an adequate system of monitoring.[177] These figures have not been, and apparently were not designed to be, recalculated every year or at any regular interval to take into account changes in institutionalization rate in the "most compliant" states.

It is clear that the application of the three criteria for a DSO de minimis finding leaves room for administrative discretion and that the de minimis concept as thus elaborated permits a significant rate of institutionalization of status offenders and nonoffenders as long as the state makes a promise and commitment (through the enactment of state law) to achieve full compliance within a reasonable period of time. In fact it was contemplated that those states which had very low rates of institutionalization at the time they began participation in the formula grant program and, on that account, would not be able to satisfy the 75 percent reduction required for a finding of substantial compliance might use the de minimis concept to remain eligible for grant awards.[178] In short, the notion of a prior "good faith" effort and the evidence of "commitment" to achieve full compliance characterize the statutory and regulatory preconditions for extension of compliance deadlines on the basis of

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[175] 46 Fed. Reg. at 2567.

[176] *Id.*

[177] *Id.*

[178] *Id.* at 2566.

"substantial compliance."[179] Good faith and commitment are mirrored also in the elaboration of the de minimis concept which was first formally adopted by the agency in 1981 after Congress had amended the Act in both 1977 and 1980 to incorporate definitions of substantial compliance.[180] However there is no legislative history which explicitly endorses--or rejects--a de minimis rule as applied to the mandates.

With regard to jail removal, the Office first added a de minimis concept in its 1985 formula grant regulations.[181] Essentially it focused on the type of noncompliance considered by Criterion B of the DSO de minimis, that is, violations of existing state law or policy. Specifically, in order for the Office to make a finding of compliance with de minimis exceptions for jail removal purposes, state law or policy had to prohibit confinement of juveniles in circumstances violating the jail removal mandate; all reported instances of noncompliance in the most recent monitoring report must constitute violations of that law or policy; such violations must not indicate a pattern or practice; existing legal mechanisms must be such that the violations are not likely to reoccur; and an acceptable plan must have been developed to eliminate noncompliant instances.[182]

Curiously this same set of formula grant regulations of June 1985 also included a provision for determining full compliance with the separation mandate which was largely identical except for the omission of a requirement for an "acceptable plan" to eliminate violations. For unstated reasons, the Office chose not to denominate this a "de minimis" exception.[183] This same "exception" from 100 percent compliance with the separation mandate is still contained in the Office's regulations.[184]

The jail removal de minimis standard was expanded in November, 1988 through an amendment to the grant regulations.[185] What was added was a statistical measure along with a provision making allowance for exceeding the designated rate in certain circumstances. In this regard the standard was similar to the DSO approach, though it did not duplicate its use of interrelated "criteria" and range of statistical rates of noncompliance. Specifically, the annual rate chosen for jail removal purposes was nine instances of violation per 100,000 of juvenile population (calculated on the basis of data from 12 states), not to be exceeded unless the State had "recently enacted changes in state law which have gone into effect and which the State demonstrates can reasonably be expected to have a substantial, significant and positive impact on the state's achieving full (100%) compliance or full compliance with de minimis exceptions by the end of the monitoring period immediately following the monitoring period under consideration."[186] In addition the State must have an acceptable plan to eliminate the noncompliant instances. Finally, in order for a State to remain eligible for a finding of full compliance with de minimis exceptions, the state must annually demonstrate "continued and meaningful progress toward achieving full (100%) compliance."[187]

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[179] See text at notes 69-76, 94, 98-99, 151-59 *supra*.

[180] See text at notes 69-76 *supra*.

[181] 50 Fed. Reg. 25551 (June 20, 1985).

[182] *Id.* at 25560.

[183] *Id.*

[184] See text at note 128 *supra*.

[185] 53 Fed. Reg. 44370.

As Appendices C1, C2 and C3 to this study demonstrate, a considerable number of states rely on the de minimis concept, whether for DSO or jail removal, in order to remain eligible for OJJDP formula funding.

8. Limited "Permitted" Holding Periods

As indicated previously in the discussion of the legislative history of the DSO and jail removal mandates, Congress anticipated the need for some continuing flexibility for state and local officials in working within the DSO and jail removal mandates.[188] Accordingly, it was willing to countenance holding accused status offenders and nonoffenders in secure facilities for up to 24 hours (with separation from adults) in determining compliance with the DSO mandate and holding accused delinquent offenders (but not status offenders and nonoffenders) in adult jails and lockups for up to 6-hours for investigation, processing and other purposes in determining compliance with the jail removal mandate. These "exceptions" are contained in the part of the Office's grant regulations which describe the types of data to be submitted in the required annual monitoring reports to OJJDP.[189] The "nonsecure" custody policy supplements the permitted 6-hour holding period to increase somewhat police flexibility in dealing with alleged delinquent juveniles in police custody.[190] It also achieves the same result with regard to status offenders and nonoffenders as to whom the 6-hour holding period does not apply.[191]

It is important to note that, despite the fact that the Office does not "count" instances falling within the limited (6- and 24-hour) holding periods against a state's continued eligibility for funding--as it does not "count" the instances encompassed within a de minimis finding against the State--the Office still considers all these instances to be technical violations of the statutory mandates which states should attempt to reduce or eliminate.

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[186] *Id.* at 44371.

[187] *Id.* at 44371. The jail removal de minimis standard now appears at 28 CFR §303(f)(6)(iii)(C) (1991).

[188] See text at notes 65-68, 92-93 *supra*.

[189] 28 CFR §303(f)(5)(i)(C) (DSO), (f)(5)(iv)(G), (H) (1991).

[190] See 53 Fed. Reg. 44366-67.

[191] See text at note 93 *supra*.

In part this treatment of violations is reflected in the requirement that states seek to eliminate all noncompliant instances that fall within the de minimis range.[192] The Office does not approach the limited holding periods in exactly that same way, apparently in the belief that the need for police flexibility which the holding periods seek to accommodate may be a continuing one which may not disappear over time. In considering all of the instances of secure holding of status offenders and jailing of juveniles as violations of the JJDP Act, OJJDP attempts to avoid the connotation that they represent good social policy as opposed to concessions to administrative reality in overseeing a grant program and in running a police department. This in turn may preserve the "moral" force of the mandates and convey to states the need to hold departures therefrom to the absolute minimum.

9. Monitoring

The legislative regulations of the Office describe in some detail the monitoring required of states for determining compliance with the mandates and the information required in the annual monitoring reports sent to OJJDP.

The states are required to: (1) identify all public and private facilities encompassed within the scope of the mandates and determine which are secure detention or correctional facilities or adult jails or lockups; (2) inspect the facilities to confirm the appropriate classification and to determine whether adequate separation exists and the type of record-keeping system utilized to maintain the data necessary for compliance findings; and, finally, (3) collect and verify data from the facilities subject to the mandates.[193] If there are "barriers" in the way of a state's having an adequate monitoring system, the state plan must identify those and indicate how they will be overcome.[194]

Monitoring reports must be submitted annually to the Office no later than December 31. The reporting period should cover 12 months of data, but in no event less than 6.[195] The regulations specify in detail all of the information deemed necessary for the Office to determine compliance status.[196] These reports are used to determine eligibility for future grant awards which are to be made following the beginning of a new fiscal year. Therefore, in practice, determinations of full compliance, de minimis full compliance, substantial compliance, and noncompliance are generally based on data collected a year or more before the beginning of the new fiscal year to which the grant applies.

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[192] See text at notes 174-75 and 187 *supra*.

[193] 28 CFR §303(f)(1)(i) (1991).

[194] *Id.* §303(f)(1)(ii) (1991).

[195] *Id.* §303(f)(5) (1991).

[196] *Id.*

For example, a state's monitoring report covering the period January 1, 1988 to December 31, 1988 would be received and analyzed during fiscal year 1989 and used to determine eligibility for 1990 fiscal year grant funds. Moreover, since the compliance date for jail removal was "after" December 1988, practically speaking it would be the data covering 1989 which would indicate whether full compliance or full compliance with de minimis exceptions had been achieved on time. The monitoring report for 1989 did not have to be submitted earlier than December 1989 and thus would be used in relation to the 1991 fiscal year grant.

As noted earlier, the statute expressly exempts states from submitting the annual monitoring reports to OJJDP (but not from maintaining adequate monitoring systems) in certain circumstances.[197] The Office's regulations largely mirror the statutory requirements and do not address the anomaly that compliance with the DSO and separation mandates (but not jail removal) is the condition precedent to waiver of monitoring reports which are to cover compliance with all three mandates.[198] The statutory language does not indicate much in the way of administrative discretion if the conditions specified in the statute are met (and compliance with jail removal is not one of those).

III. Policymaking and Application by OJJDP

A. An Overview of the Intra-Agency Process for Policymaking

With regard to the formula grant program, the Office is not primarily a policymaking agency. Generally speaking, upon submittal of an acceptable plan, the Office must award a grant to the state.[199] The criteria for an acceptable plan and continued eligibility for a grant are elaborated in considerable detail in the statute. The prior description of the Office's grant regulations indicates some administrative elaboration, at times very significant. However, compared to other federal agencies and programs--particularly those in the regulatory area such as the Environmental Protection Agency, the Occupational Health and Safety Administration, and the Securities Exchange Commission--the number of OJJDP's published rules and nonpublished policies and interpretations is modest indeed.

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[197] See text at notes 105-06 *supra*.

[198] 28 CFR §303(f)(7) (1991). See text at notes 105-06.

[199] *Cf.* 42 U.S.C. §5633(c)(1) ("The Administrator shall approve a State plan and any modification thereof that meets the requirements of this section."). *See also id.* §5632 (mandatory allocation).

This comparison to regulatory programs is not inappropriate in the case of this grant-making agency. The nature of the statutory mandates for which it is responsible has gone a long way in causing SRAD to perform very much like a typical regulatory body. From the point of view of the states faced with the DSO and jail removal mandates and deadlines, the division is perceived as operating in an "enforcement" mode. Most telling is the fact that the monitoring reports required by the statute are not related to how the federal funds have been expended but rather to progress made in achieving the mandates which themselves call for very concrete, real world results. Such reports are analogous to emission and discharge reports required under various environmental statutes which are concededly "regulatory" in the true sense of the term.

Outside the lack of civil and criminal penalties as enforcement sanctions, SRAD differs most from the typical regulatory body in the small scope of its permitted policymaking function.[200] This is not to say, however, that SRAD could not, over the years, have lawfully exercised more policymaking initiative than it has.

It appears that over most, if not all, of its lifetime and particularly in recent years, SRAD has developed policy positions and interpretations largely in a reactive mode. One or more states may have raised an issue regarding a particular statutory provision or one of the grant regulations. That would trigger discussions within the division regarding the need for an official position, which might then be issued as part of the legislative rules of the agency, in a Federal Register pronouncement, or in a letter or memorandum which ultimately might find its way into the staff manuals used by the Office. As it turns out, most of the significant issues that have been resolved are now covered by the published regulations, at least in the area of the mandates and compliance with them. The former position of monitoring coordinator afforded the Office the perspective of an employee who was in close touch with developments and problems across the states. He could, therefore, identify issues of policy or interpretation that affected more than one state soon after they arose and bring those to the attention of the Division Director for possible resolution through a general statement of policy or interpretation. The abolition of that position could create future difficulties to the extent that the Division Director or someone else in the Office does not maintain close surveillance over state developments, a point acknowledged by SRAD. Without that, issues requiring resolution will simply be ignored or take long to surface (leaving the states without guidance), will perhaps be resolved differently by different state representatives, or will finally confront the Division Director in an atmosphere laced with state frustration and irritation.

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[200] *Id.* §5633(a).

Even when the Office retained the position of monitoring coordinator, however, his duties went beyond that function and thus other responsibilities competed for his attention. Issues calling for a general policy statement or interpretation could not always be resolved by the issuance of written general guidance in a timely fashion. This left the states without guidance and may have contributed to confusion regarding SRAD's expectations. These are among some of the ramifications of the heavy workload of the division which is not being matched by the commitment of adequate personnel resources.[201]

In addition, while there is one OJP Office of General Counsel attorney who is assigned to assist the Office, at times over the last decade or so SRAD personnel were explicitly told not to seek his assistance. While the precise impact of breakdowns in communication between the division and OGC is not entirely clear, their occurrence may have hampered reasoned and lawful evolution of Office policy.

Given the roles the state representatives play in dealing with states,[202] it would appear crucial that at least the substance of the advice given states on important issues should be known to others within SRAD, if only to promote consistency in treatment of the States. In fact the written description of the roles and responsibilities of state representatives expressly requires that "[a]ll correspondence leaving the Division shall be routed through the Division Director for final review, and logged out by the SRAD Control Desk. These procedures are designed to assure uniform quality in copy leaving the Division, and to assure that regulations and policy are accurately and consistently interpreted."[203] This directive is complemented by another which requires state representative preparation of "contact sheets" which apparently summarize oral advice or interpretations given states and which may be circulated within the office to at least the Division Director.[204]

However, one of the complaints regarding SRAD over the years has been inconsistency, including inconsistency in what is told to the states by different state representatives and in what is said by the same representative at different times. The survey of state representatives conducted as part of this study indicated that at least 38% of the respondents believed that SRAD was inconsistent among states.[205] Compliance with the office's own internal operating procedures might go a long way toward eliminating this source of frustration for the states.

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[201] See text at notes 32-34 *supra* and text at notes 372-74 *infra*.

[202] See text at note 36 *supra*.

[203] State Representative Roles, *supra* note 36, at XIV.1 (1989).

[204] *Id.* at V.1.

SRAD is very small in terms of its allocated positions (less than 15). A formally issued directive regarding the "route" for policy evolution within the office might, therefore, be unnecessary or even counterproductive to the extent it introduces inflexibility. Still, consideration should be given to the formulation of a memorandum to the state representatives which provides them with some indication of when to seek the advice of the Office of General Counsel and when an issue might be the type of policy or interpretative problem requiring resolution by the Division Director or the Administrator. For new state representatives, such guidance might be very important indeed.

B. Consultation with Outsiders

Omitted from the discussion to this point has been any reference to the role of persons and groups outside the government in the policymaking process. It is clear that, over the years, the Office has engaged in consultation with outsiders both through the "formal" mechanisms of notice-and-comment rulemaking and in less formal ways. As with other agencies, questions regarding the degree and kind of necessary and appropriate consultation are answered by reference both to statute and good administrative practice.

In the case of OJJDP there is an express special statutory obligation to consult states and local governments prior to the adoption of at least some of its rules[206] and perhaps an implied statutory obligation to consult the National Coalition of State Juvenile Justice Advisory Groups in its rulemaking efforts.[207] OJJDP has often engaged in consultation with regard to its rulemaking where not required by law. At times, however, its willingness to involve interested outside parties early in its policymaking process has been more restrained than it should have been. In fact, on several recent occasions it may have violated its special statutory obligations to consult the states and the Coalition.

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[205] See Appendix D3 at 3-4, which is available upon request from the Conference.

[206] See text at note 223 *supra*.

[207] See text at note 227 *supra*.

1. Section 553 Notice-and-Comment Procedures

The most familiar mode of predecisional consultation between an agency and its public is the notice-and-comment rulemaking procedures of Section 553 of the Administrative Procedure Act (APA).[208] However, despite recommendations by the Administrative Conference in 1969 that Congress repeal the blanket exemption from Section 553 for matters "relating to . . . grants,"[209] there has been no such amendment enacted to date. Accordingly, neither procedural nor substantive rules which "directly" relate to grants need be adopted after a round of public comment.[210]

An agency can waive this exemption. Some in fact have.[211] When that has occurred, courts have enforced the notice-and-comment procedures despite the exemption.[212] Neither the Department of Justice, the Office of Justice Programs, nor OJJDP have, however, expressly waived the APA exemption as it applies to the formula grant program. The Office has consistently over the years adhered to notice-and-comment procedures with regard to the legislative regulations it has issued to implement that program. While it is not entirely clear whether that course of conduct would be deemed to be a constructive waiver, it is unlikely that such would be found.[213] If voluntarily going out for comment on a regular basis would bind an agency to that in the future, agencies would be more likely to avoid the comment process altogether.[214]

In short, OJJDP is likely not subject to notice-and-comment consultation procedures with regard to the formula grant program. Even if it were, some of the Office's issuances--such as the nonsecure custody statement and the DSO de minimis standard--might be considered "interpretative rules" or "general statements of policy" and thus statutorily exempt from those procedures.[215] The DSO de minimis policy was, however, subjected to the comment process. The jail removal de minimis policy and the definition of "separateness" for jail removal purposes[216] eventually became part of the Office's legislative rules and were thus adopted after notice-and-comment.

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[208] 5 U.S.C. §553(b), (c). For a general overview of the applicability of the APA to Federal grant programs, *see* Yamada, *Rulemaking Requirements Related to Federal Financial Assistance Programs*, 38 Fed. Bar J. 89 (1980).

[209] 1 CFR §305.69-8 (1991).

[210] *See, e.g.*,, National Wildlife Federation v. Snow, 561 F.2d 227 (D.C. Cir. 1976).

[211] *See* Administrative Conference of the United States, A Guide to Federal Agency Rulemaking at 82 and n.181 (2d ed. 1991) (listing some of the agencies waiving or limiting the exemption).

[212] *See, e.g.*,, Rodway v. USDA, 514 F.2d 809 (D.C. Cir. 1975).

[213] *See, e.g.*,, Malek-Maizbanv v. INS, 653 F.2d 113, 116 (4th Cir. 1981) (deals with the "foreign affairs" exemption and emphasizes the need for "swift action."); Lewis v. Richardson, 428 F. Supp. 1164 (D. Mass. 1977).

[214] *Cf.* 468 F. Supp. at 1168 n.6.

[215] See 5 U.S.C. §553(b)(A).

2. Other Statutory Requirements for Consultation

a. With States and Local Governments

The office did not utilize notice-and-comment procedures with regard to the "clarification" of the definition of facility "separateness" which was issued in July 1991 after the matter was raised by Wisconsin's 1990 request to remain a participating state in the formula grant program.[217] Given the "grant" exemption along with that for "interpretative rules,"[218] there is a strong argument that the APA itself did not require consultation via a comment process prior to adoption of this policy. After all, the office was apparently purporting to interpret its own regulations.[219]

Beyond the APA, however, the office is or may be subject to other statutory requirements for consultation. As noted above, it has been given at least two express general grants of rulemaking power that would appear to relate to the formula grant program.[220] In addition, there may be either a third grant of rulemaking power or a cross-reference to the other two.[221]

The first authorization of rulemaking is expressly made applicable to award, administration, monitoring and other functions relating to grants, formula and otherwise.[222] The second relates to rules "necessary for the exercise of the functions of the office and as are consistent with the purpose of this Act" and expressly requires "appropriate consultation with representatives of States and units of local government" prior to rule adoption.[223]

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[216] See text at notes 137-45, 181-87 *supra*.

[217] See text at notes 142-45 *supra*.

[218] See 5 U.S.C. §553(b)(A).

[219] See OJJDP Policy 91-1401 (July, 1991) ("For ease of reference, this clarification will reiterate each of the four criteria, expanding as necessary on what arrangements will be accepted by the Office . . . as constituting compliance with each criterion."). Some arguments were raised that SRAD was misinterpreting or changing its regulatory definition of "separateness." In view of the APA grant "exemption" and for other reasons that will appear, see text at notes 223-26 and 321-24 *infra*, it would not be worthwhile to evaluate here the merits of those arguments from the point of view of the APA, though it is appropriate to note that had a "change" in its regulations been attempted and had the grant exemption been waived in fact or constructively, a notice process would have been legally required.

[220] See text at notes 25-26 *supra*.

[221] *See* 42 U.S.C. §5633(a) ("In accordance with regulations which the Administrator shall prescribe, such plan shall . . .").

[222] *Id.* §5611(b).

Whether or not the 1991 policy should be deemed a "clarification," change in the regulation, or something else, at a minimum it is a "rule" within the meaning of the 1946 APA[224] and arguably within the meaning of the later-enacted JJDP Act. Accordingly, the JJDP Act itself may have required "appropriate consultation" at least with the states and local governments prior to the adoption of this policy. By the same token, of course, even conceding the inapplicability of the APA, the Office's adoption of its legislative grant rules may require some type of prior consultation with at least the states and local governments because arguably the adoption of those is subject to this same section of the JJDP Act.

Unfortunately, there is no congressional history or other basis that convincingly explicates the scope or content of this "consultation" requirement. Contentions for and against its application to the 1991 policy and the office's legislative rules are equally plausible.

It could certainly be argued, based on the "canons" of statutory construction, that the rulemaking authority expressly applicable to grants is the only one relevant to the formula grant regulations and their interpretation.[225] It does not contain a consultation mandate. On the other hand, of all the rules promulgated by the Office that might be of interest to states and local governments, those establishing the eligibility for formula grant funds would likely be foremost on the list. If the consultation requirement is to have meaningful scope in its operation, it should, therefore, apply to such rules.

Even if the consultation requirement is applicable, one might contend that only "appropriate" consultation is mandated and that either no prior consultation may be appropriate in some cases or, in any event, required consultation can take forms other than notice-and-comment procedures. The latter point is well taken. However, it is unlikely that the separateness "clarification" in 1991 was an appropriate case for no prior consultation.[226]

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[223] *Id.* §5672(d).

[224] 5 U.S.C. §551(4).

[225] *See generally* W. Eskridge & P. Frickey, Cases and Materials on Legislation/Statutes and the Creation of Public Policy 639-46 (1988) (general discussion of canons). Canons which might be invoked include some version of "expressio unius est exclusio alterius" (inclusion of one thing indicates exclusion of the other) and "specific" statutes control over "general" ones. *See* Radzanower v. Touche, Ross & Co., 426 U.S. 148 (1976).

[226] See text at notes 321-24 *infra*.

b. With the National Coalition

The statutory roles of the National Coalition of State Juvenile Justice Advisory Groups to review federal policies regarding juvenile justice and to advise the Administrator might be construed to require some form of prior consultation with at least the Coalition (whose members represent all the participating states' SAGs)[227] whenever the Office has decided to propose legislative regulations or other important policy or interpretative pronouncements. If the 1991 "clarification" is judged not only by the outcry from both the Coalition and some states that preceded and followed its issuance but also by its significance in defining the contours of the jail removal mandate, that policy would seem to fit comfortably within the type of regulatory action requiring the involvement of the Coalition under this view of its statutory role.

At the same time the controversy over the "clarification" of the separateness criteria was brewing, the office made what appears to have been an important new or changed policy on the coverage of the mandates with regard to persons who were under juvenile court jurisdiction when initially held for offenses but are later mixed with adults or placed in adult facilities after they have attained the age of 18.[228] The office held that the separation and jail removal mandates did not apply in those contexts. It did so in a letter to the state (New Jersey) which raised the issue, without apparently either the prior review of the Office of General Counsel or prior consultation with the Coalition, other states, or other interested outsiders.

3. Sensitivity to the Value of Consultation

Avoidance of prior consultation on important issues did not surface as a significant complaint either in the telephone interviews with state specialists[229] or during the on-site factfinding. The recent episodes with regard to the 1991 separateness clarification and the New Jersey case may be as atypical as they were unfortunate in the apparent lack of attention to the need for consultation. At the same time, they suggest that the Office should be particularly sensitive to the value of consultation, both from the point of view of assuring that it has all the information it needs for making a decision and that concerned outsiders feel that they have been fairly treated and their needs taken into account. Such an approach is further required by the apparent concern of the JJDP Act itself for adequate prior consultation and by various outstanding Executive Orders.[230] For example, prior consultation may not have averted the furor that accompanied Wisconsin's reentry as a participating state. But it may have taken some of the edge off the tone of debate and facilitated the establishment (or reestablishment, depending on the point of view) of more amicable and productive relationships among the office, the Coalition, and concerned states.

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[227] See text at note 45 *supra*.

[228] Letter from Eugene L. Rhoden, Jr., Acting Director, SRAD to Thomas F. Lynch, Assistant Commissioner, New Jersey Department of Corrections (April 11, 1991).

[229] *See* Appendix D3 at 3, which is available upon request from the Conference.

The recently prepared staff manuals[231] contain a variety of interpretations and policy statements. It is not clear in most cases what type, if any, consultative process was engaged in prior to their issuance. That they were included in these manuals suggests that the issues are likely to be confronted in more than one state, that is, they have some general and continuing applicability.

4. Methods of Consultation

In the past, the office has engaged in informal (that is, other than notice-and-comment) methods of consultation on some occasions in formulating positions on issues. This has taken a variety of forms, including circulation of draft positions and discussion at national or regional meetings of state juvenile justice specialists.

The "public" concerned with issues presented by the formula grant program extends beyond the Coalition and state and local officials. It also includes those juveniles for whose benefit the mandates were designed. Consultation via the Federal Register may in some cases be the most effective method of reaching all those who wish to have input. In other instances, consultation with the Coalition and/or the states alone may be adequate. Given the likely inapplicability of Section 553, the office has maximum flexibility to employ those consultative methods which are appropriate to the issues presented and audience most directly affected, which sometimes may include Federal Register publication and at other times less elaborate and expensive means.

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[230] *See* Executive Order 12372--Intergovernmental Review of Federal Programs, 3 CFR, 1982 Comp. at p. 197 (Sec. 1) ("Federal agencies shall provide opportunities for consultation by elected officials of those state and local governments that would provide the nonFederal funds for, or that would be directly affected by proposed Federal financial assistance . . . ."); Executive Order 12612--Federalism, 3 CFR, 1987 Comp. at 252 (Sec. 3(d)(3)). ("When undertaking to formulate and implement policies that have federalism implications, executive departments and agencies shall . . . [w]here national standards are required, consult with appropriate officials and organizations representing the States in developing those standards.")

[231] *See* note 121 *supra*.

C. Use of the Federal Register for Notification Purposes

Regardless of the requirements of Section 553 of the APA to engage in a public notice-and-comment process prior to final rulemaking, the APA requires that certain agency "rules" be published in the Federal Register for the purpose of notifying the public of what the "law" is. Specifically, the statute mandates that "[e]ach agency shall separately state and currently publish in the Federal Register for the guidance of the public--. . . substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency."[232] However, an agency need only "make available for public inspection and copying . . . those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; . . . and administrative staff manuals and instructions to staff that affect a member of the public."[233]

Over the years, compliance by federal agencies with these requirements has left something to be desired if only because of the less than clearcut statutory distinction between those classes of materials which must be published and those which must be merely made publicly available.[234]

For the most part the office seems to have complied with statutory publication requirements. Its finally adopted legislative regulations appear in the Register, as have most of its important policy statements, including the de minimis standards, the original policy on "separateness" of facilities for jail removal purposes, and the nonsecure custody policy.

However, the 1991 "clarification" of the "separateness" definition[235] issued in connection with Wisconsin's renewed participation in the formula grant program was not published. Rather it was issued as a component of the agency's staff manuals. It is clear that inclusion of an agency statement of policy or interpretation in a staff manual does not excuse publication if that publication is otherwise required.[236] Such publication is required if it is a "statement of general policy" or "interpretative rule of general applicability."[237] Regardless which classification is appropriate for the 1991 "clarification," the statement certainly was "general" in the explicit scope of its application. That is the characteristic which the relevant provisions of the APA seem to emphasize with regard to required publication. Without resorting to the caselaw, there is a strong textual argument, therefore, that the nonpublication of the "separateness" policy violates the APA.

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[232] 5 U.S.C. §552(a)(1)(D).

[233] *Id.* §552(a)(2)(B), (C).

[234] *See generally* Springer, *Gatekeeping and the Federal Register: An Analysis of the Publication Requirement of Section 552(a)(1)(D) of the Administrative Procedure Act*, 41 ADMIN. L. REV. 533 (1989).

[235] See text at notes 142-45 *supra*.

[236] *See, e.g.,*, Morton v. Ruiz, 415 U.S. 199 (1974).

[237] 5 U.S.C. §552(a)(1)(D).

Unfortunately, matters are not this simple. There are some cases which suggest that mere "clarifications" (as opposed to changes) need only be "made available" and not published.[238] However, those cases suggest that if a "clarification" has a "significant impact" on the "public," it may have to be published.[239] This latter part of the judicially-evolved test would appear to be satisfied with regard to the Office's 1991 "clarification" of the definition of separateness for jail removal purposes, given the important impact the policy may have on states seeking to comply with the jail removal mandate along with the derivative impact on juveniles who will be housed in "co-located" facilities. A confident conclusion regarding the need for publication of this "clarification" is muddied further in view of Professor Kenneth Culp Davis' evaluation of the caselaw to the effect that "[t]he law is neither that interpretations must be published nor that they need not be; it is that the answer usually depends on the court's sense of justice in light of the whole case."[240]

By the same token, the recent letter to New Jersey regarding the treatment of persons adjudicated originally before a juvenile court[241] arguably represented an interpretation or policy of general applicability and significant impact and therefore had to be published. However, it not only went unpublished, but, as far as can be determined, it had not been added to the agency's staff manuals for the information of OJJDP personnel and state juvenile justice specialists.

At least some of the "policy" statements and legal interpretations found in the two-volume staff manual[242] might likewise be subject to the publication requirement of the APA. It must be conceded, however, that the availability of these, along with the Wisconsin "clarification," in publications (i.e., the staff manuals) that reach those persons most interested in many of these issues--OJJDP and state agency personnel--might seem to make their Federal Register appearance more a matter of form than substance in terms of performing a true informing function. Yet, the New Jersey case and others[243] indicate that these manuals have not been regularly updated since their issuance in 1989-90 despite the fact that that was apparently the original intent of the office.

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[238] *See, e.g.,*, Lewis v. Weinberger, 415 F. Supp. 652 (D.N.M. 1976). *See also* Springer, *supra* note 234, at 538-40.

[239] *See* Springer, *supra* note 234, at 538-40.

[240] K.C. Davis, Administrative Law of the Eighties 122 (1989).

[241] See text at note 228 *supra*.

[242] See text at note 121 *supra*.

[243] See text at notes 353-54 *infra* (discussing de minimis policy regarding monitoring data).

In sum, the office should pay more attention to the publication obligations of the APA in adopting new policies and interpretations as well as in changing or clarifying old ones. Professor Davis has himself suggested that "agencies should probably resolve doubts in favor of following the exact words" of the statute and thus publish.[244] The office should also take whatever steps are necessary to ensure expeditious and regular updating of its staff manuals.

Regardless of the form of communication--whether Federal Register, addition to staff manuals, or other means--from the office to the states, roughly a quarter of the state juvenile justice specialists found the clarity of the office's communications less than adequate.[245] In fact, in 1989 a group of specialists wrote the then Acting Administrator indicating that

> [p]olicy direction and rationale contained in the Federal Register are often unclear. . . . It would be advantageous to have regulations contained in the Federal Register . . . supplemented by . . . explanatory correspondence from the Office. The explanation would capture the essence of the information in the Federal Register in layman's terms. It could be used by the states for guidance when commenting on announcements in the Register.[246]

Accordingly, the office should make special efforts to explain its policies to the states more clearly and extensively and in a timely fashion.

D. Administrative Flexibility

We now focus on the administrative flexibility exhibited by OJJDP in its interpretation and enforcement of the statutory mandates. Monitoring will be dealt with in the next section. It should be noted at the outset that the findings in this section regarding administrative flexibility are based on a review of the statute, agency regulations and guidelines, along with interviews. We did not review all or even a random selection of grant files.

Keeping that caveat in mind, it can be said that, generally speaking, the office has possessed the administrative discretion needed to advance the formula grant program objectives envisioned by Congress. Moreover, in the context of both the specificity of the mandates and the nature of a formula grant program which vests little policymaking discretion in the administering federal entity, SRAD has generally exhibited necessary and appropriate administrative flexibility in elaborating the various elements of the formula grant program. Additional flexibility and legal discretion might very well have resulted in a much lesser degree of compliance with the mandates than exists today as states resisted attempts to change their juvenile incarceration practices.

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[244] See Davis, *supra* note 240, at 122.

[245] See Appendix D2 at 7, which is available upon request from the Conference.

[246] Letter of State Juvenile Justice Specialists to Terrence Donahue, Acting Administrator OJJDP (May 15, 1989).

1. Overview

From both legislative and administrative perspectives, the evolution of the formula grant program has generally conformed to the same pattern: good faith efforts to achieve compliance and promote the adoption of sound professional law enforcement practices have been acknowledged and encouraged by time extensions or other types of relief, while there has been an insistence on ultimate compliance by a set date.

Over time, some administrative inventions have been adopted by Congress, as in the case of the 75% removal standard for substantial compliance with the DSO mandate, a standard later applied statutorily to jail removal.[247] Conversely, over the years, congressional committee reports have suggested additional areas for flexibility, which have been picked up by OJJDP in its formula grant regulations. For example, the 6- and 24-hour "holding" periods countenanced as exceptions to the literal commands of the jail removal and DSO mandates respectively originated in that fashion.[248] So too did the jail removal exceptions for "juveniles formally waived or transferred to criminal court and against whom criminal felony charges have been filed" and for "juveniles over whom a criminal court has original or concurrent jurisdiction and such court's jurisdiction has been invoked through the filing of criminal felony charges."[249]

It is not clear why Congress did not write the holding period exceptions into the language of the statute in view of the fact that the seemingly absolute language of the mandates appears otherwise to be misleading. However, at least with regard to DSO, the legislative history suggests that additional

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[247] See text at note 94 *supra*.

[248] See text at notes 65-68 and 92-93 *supra*.

[249] 28 CFR 303(e)(2) (1991). See text at notes 86-89 *supra*. The House Committee referred to "criminal charges," see text at notes 86-89 *supra*, though the Office restricted the exemption to "felony" charges.

"exceptions" might fall within the "rule of reason" which Congress expected the Office to follow.[250]

It is possible that the legislature believed that codifying all these "exceptional circumstances" was impossible or unwise given the need for administrative flexibility. Alternatively, Congress may have hoped that the development of alternatives to secure holding of juveniles would develop to the point that eventually the office would be able to restrict or even eliminate the need for exceptions of various types. Drafting express exemption authority into the legislation may have been viewed as either opening up the door for too much administrative discretion in the office or diluting the "moral" force of the mandates and thereby encouraging states to delay their compliance efforts.

2. Separation Mandate

OJJDP has permitted states to set their own dates for full compliance with the separation mandate. Interestingly, the literal language of the statute does not necessarily point in that direction.[251] However, in view of the institutional changes (whether in terms of construction or operational plans) required to separate adults and juveniles incarcerated together, it would have been arguably unreasonable for Congress to insist upon immediate compliance. That Congress did not require immediate compliance with regard to the other mandates but rather recognized the need for adjustment periods suggests that it must have similarly realized that need in the case of the separation mandate. There is no legislative history indicating Congress' approval or disapproval of the Office's long-standing interpretation of the JJDP Act.

3. De Minimis Rules

In the context of the JJDP Act, the Office's development of a de minimis concept to excuse full (i.e., 100%) compliance with the mandates might be considered one of the more debatable exercises of administrative invention. After all, in providing for continued eligibility for funding in 1977, 1980 and 1988 where a state had achieved only "substantial" compliance but strictly limiting the time periods during which such a basis for relief would be available, Congress may have meant to convey that, following the expiration of those time periods, a state must have literally achieved the level of perfectly full compliance. The 1980 amendments to the JJDP Act required that "*no*

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[250] See S. Rep. No. 95-165, 95th Cong., 1st Sess. at 60-61 (1977) ("While Section 223(a)(12) appears to be an absolute prohibition, the committee recognizes that there may be rare situations in some states where short-term secure custody of status offenders is justified. For example [24 hour hold].").

[251] See text at notes 81-82 *supra*.

juvenile shall be detained or confined in any jail or lockup for adults" (outside rural areas).[252] Furthermore, as noted above, the articulation of the de minimis concept by the Office bears some resemblance to the statutory and administrative conditions for time extensions based on "substantial" compliance.[253]

Congress has neither in legislation nor legislative history (including oversight hearings) approved or disapproved the Office's general approach to defining "full compliance." It is, however, likely aware of it. The de minimis concepts as they apply to DSO and jail removal are clearly articulated or referred to in the agency's own grant regulations.

The analysis that follows concludes that, while the Office's general assertion of de minimis authority is or should be considered within its lawful discretion, certain important aspects of its existing de minimis policies may not be.

a. Caselaw on De Minimis Authority

Congressional inaction in response to the office's de minimis approach cannot convey administrative power to depart from existing statutory mandates. The Office's claimed de minimis authority must ultimately rest on some firmer foundation.

Recent judicial decisions outside the grant area have focused on the authority of an agency to permit "de minimis" departures from what otherwise appear to be clear statutory requirements. *Alabama Power Co. v. Costle*,[254] in which one panel of the Court of Appeals for the District of Columbia Circuit reviewed the regulations of the Environmental Protection Agency for preserving clean air quality, appears to have established the prevailing approach to examining assertions of agency power of this nature. In his opinion for the court, Judge Leventhal noted:

> Categorical exemptions may also be permissible as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered *de minimis*. It is common-place, of course, that the law does not concern itself with trifling matters, and this principle has often found application in the administrative context. Courts should be reluctant to apply the literal terms of a statute to mandate pointless expenditures

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[252] See text following note 84 *supra*.

[253] See text at note 179-80 *supra*.

[254] 636 F.2d 323 (D.C. Cir. 1979).

> of effort . . . . The ability, which we describe here, to exempt *de minimis* situations from a statutory command is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design.
>
> Determination of when matters are truly *de minimis* naturally will turn on the assessment of particular circumstances, and the agency will bear the burden of making the required showing. But we think most regulatory statutes . . . permit such agency showings in appropriate cases.

While the difference is one of degree, the difference of degree is an important one. Unless Congress has been extraordinarily rigid, there is likely a basis for an implication of *de minimis* authority to provide exemption when the burdens of regulation yield a gain of trivial or no value. That implied authority is not available for a situation where the regulatory function does provide benefits, in the sense of furthering the regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs. For such a situation any implied authority to make cost-benefit decisions must be based not on a general doctrine but on a fair reading of the specific statute, its aims and legislative history.[255]

Given the number of complex issues presented, the court's opinion was divided among the three judges. Judge Wilkey's opinion also alludes to the de minimis concept. However, he appears to take a position somewhat distinct from Judge Leventhal's. Specifically, Judge Wilkey suggests that "administrative burdens" can to some extent form the basis for an agency's fashioning of de minimis exceptions,[256] while Judge Leventhal indicates that the absence of benefits is the touchstone for a finding of de minimis authority.[257]

At one point in his analysis, Judge Leventhal links his approach to de minimis authority with what he considered to be an accepted qualification to the "plain meaning rule" of statutory construction, that is to say, "a court must look beyond the words to the purpose of the act where its literal terms lead to 'absurd or futile results.'"[258] At least three members of the Supreme Court (Justices Kennedy, O'Connor, and Rehnquist) have recently suggested a very narrow view of "absurdity" for the purposes of this exception to "plain meaning."[259] With the departures of Justices Brennan and Marshall, the appointment of new members of the Court who are likely to share Justice Kennedy's view, and given Justice Scalia's textualism,[260] it is possible that agency de minimis authority will be viewed even more narrowly than Judge Leventhal if the Court ever reviews a case in which its legality is at issue.

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[255] *Id.* at 360-61 (opinion by Leventhal, J.).

[256] *Id.* at 405 (opinion by Wilkey, J.).

[257] *See* Oren, *Detail and Delegation: A Study in Statutory Specificity*, 15 COLUM. J. ENVIR. LAW 143, 203 (1990).

[258] 636 F.2d at 360 n.89.

To date, however, the lower courts which have considered agency assertion of de minimis authority have relied on Judge Leventhal's opinion in *Alabama Power* and, therefore, have suggested that a balancing of costs (including perhaps administrative costs) and benefits is not permitted.[261] In *Public Citizen v. F.T.C.*,[262] Judge Wald explicated the apparent basis[263] for the very narrow approach to de minimis authority which focuses not on net benefits but on gross benefits:

> While agencies may safely be assumed to have discretion to create exceptions at the margins of a regulatory field, they are not thereby empowered to weigh the costs and benefits of regulation at every turn; agencies surely do not have inherent authority to second-guess Congress' calculations.[264]

In other words, a more generous approach to de minimis authority would basically vest in agencies the power to depart in perhaps substantial degree from congressional directives and goals in the name of cost minimization and thereby alter the agency/legislature balance. The difficulty of judicially imposing some limits on such authority would be increased by the inability or unwillingness of the courts to second-guess an agency's balance of what might be intangible or otherwise difficult-to-quantify factors.[265]

Several final comments with regard to the *Alabama Power* test are appropriate before applying it to OJJDP's de minimis standards. First of all,

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[259] Public Citizen v. United States Department of Justice, 491 U.S. 440, 470 (Powell, J., concurring and suggesting that "absurd" means "where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone.").

[260] Justice Scalia took no part in the decision in *Public Citizen*. For one analysis of his views on statutory interpretation, *see* Eskridge, *The New Textualism*, 37 U.C.L.A. L. REV. 621 (1990).

[261] *See, e.g.*,, Public Citizen v. Federal Trade Commission, 869 F.2d 1541, 1556-57 (D.C. Cir. 1989); Public Citizen v. Young, 831 F.2d 1108 (D.C. Cir. 1987); Sierra Club v. E.P.A., 719 F.2d 436 (D.C. Cir. 1983).

[262] 869 F.2d 1541.

[263] *See* Oren, *supra* note 257, at 202.

[264] 869 F.2d at 1557. *See also* Natural Resources Defense Council, Inc. v. EPA, 966 F.2d 1292, 1306 (9th Cir. 1992).

[265] *See* Oren, *supra* note 257, at 202.

Judge Leventhal speaks in terms of a presumption in favor of de minimis authority even in the constricted form which he envisions for that power. Congress can, obviously, overcome that presumption. In several recent cases, including *Public Citizen v. Young*,[266] the courts found such congressional intent to negate the authority in the text and legislative history of the Delaney Clause of the Food, Drug and Cosmetic Act.[267] Secondly, *Alabama Power* and its progeny have all involved regulatory statutes, not grant programs. These considerations make reliance on *Alabama Power* to support OJJDP's de minimis authority problematical for reasons which relate both to the grant area in general and to the program administered by OJJDP in particular.

b. Alabama Power's Application to the OJJDP Formula Grant Program

The notion of de minimis noncompliance appears not to have developed in the grant area. The need for it is simply not generally present since it is accepted that "substantial" compliance is all that is necessary to ward off grant termination.[268] "Substantial" compliance is certainly generous enough to include within it at least most levels of noncompliance which could be labeled "de minimis." Furthermore, as noted above, the congressional definition of "substantial" compliance in the JJDP Act might be taken as an implicit statement that any departures from a literal reading of the mandates constitute "substantial" noncompliance which must trigger grant ineligibility.[269] If such congressional intent exists, it would constitute the type of congressional negation of de minimis authority which would overcome the *Alabama Power* presumption (assuming that presumption is applicable). However, Congress has apparently known of and yet not expressly disapproved the office's power in this regard. This might be taken as some support for continued application of the presumption in the case of OJJDP, though cautions against reading meaning into congressional silence and inaction are legion.[270]

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[266] 831 F.2d 1108 (D.C. Cir. 1987). *See also* Les v. Reilly, ___ F.2d ___ (9th Cir. 1992), 5 Ad. L. 3d 333 (invalidating EPA order permitting use as food additives of four pesticides which have been found to induce cancer).

[267] 21 U.S.C. §376 (listing of color additive "found . . . to induce cancer in man or animal" prohibited). *See also* Les v. Reilly, ___ F.2d ___ (9th Cir. 1992), 5 Ad. L.3d (invalidating EPA order 333 permitting use of food pesticides or food additives although they have been found to induce cancer). *See generally* Gilhooley, *Plain Meaning, Absurd Results and the Legislative Purpose: The Interpretation of the Delaney Clause*, 40 Admin. L. Rev. 267 (1988).

[268] See text at note 151 *supra*.

[269] See text at notes 252-53 *supra*.

[270] *See* Eskridge & Frickey, *supra* note 225, at 760-774. Congress first added the "substantial" compliance test to the Act in 1977 with regard to DSO (the 75% test) and then in 1980 extended that concept with the jail removal mandate (the 75% test) and DSO (i.e., 100% of

While the office considers de minimis levels of noncompliance "violations" of the mandates, it does not terminate or refuse to renew funding on that basis. Despite the fact that *Alabama Power* (1979) had been decided prior to the issuance of OJJDP's first de minimis standard (DSO) in 1981 but after Congress had amended the JJDP Act to incorporate various "substantial" compliance standards (1977 and 1980),[271] the Office's public justifications for its de minimis practices have not attempted to answer the textual argument for negation of de minimis authority presented above.[272] Rather, it has relied on the general notion that "the law cares not for small things, without, however, examining the relevance of *Alabama Power*."[273] The office basically justifies its assertion of de minimis authority on its need to be "reasonable" in administering a formula grant program whose termination might not only strain federal/state relations but also destroy many important and beneficial juvenile justice projects.

The "regulatory" aspects of the formula grant program as they apply to the mandates themselves[274] might be deemed sufficient to make *Alabama Power* applicable to the Office's operations, regardless of that case's relevance to other types of grant programs.

Assuming, however, that Judge Leventhal's test is the appropriate one to apply and that Congress has not negated entirely OJJDP's de minimis authority as relates to compliance with the mandates, how do its various de minimis approaches fare? Even at this level, the result of *Alabama Power*'s application is not clearcut.

The crucial question might be phrased as follows: will OJJDP's grant termination, nonrenewal *or the threat thereof* on the basis of a "small" number of violations "yield a gain of trivial or no value"?[275] In addressing this, on the one hand, it might be argued that imposition of such sanctions or making such threats will or, at least, might force a state to remove all its status offenders

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status offenders removed from correctional facilities). In November 1988 it enacted the alternative substantial compliance standard for jail removal. Meanwhile, the DSO de minimis was published in 1980-81; the first part of the jail removal de minimis (i.e., state law violations) in 1985; and the second part of the jail removal de minimis (i.e., 9% or exceptional circumstances) during 1988 prior to enactment of the 1988 amendments to the JJDP Act. In short, the substantial compliance notion developed *before* OJJDP's de minimis concept was publicly articulated but Congress continued to elaborate and extend the substantial compliance concept during the same period the Office was extending its de minimis authority.

[271] See note 270 *supra*.

[272] *See* 46 Fed. Reg. 2566-2569 (Jan. 9, 1981); 53 Fed. Reg. 44370 (Nov. 2, 1988).

[273] *See* 46 Fed. Reg. 2566.

[274] *See, e.g.,*, text at notes 160-98 *supra*.

[275] See text at note 255 *supra*.

from secure detention and correctional facilities and all juveniles from adult jails and thus produce a "gain of [more than] trivial or no value." On the other hand, termination of a grant may have no effect other than cutting off projects benefitting the juvenile population of a state, including those juveniles who are incarcerated and who may, given additional state efforts aided by the grant funds, later be deinstitutionalized. In other words, whether there will be benefits in the absence of the de minimis rule is simply not clear. Since, under the Leventhal test, the burden is on the agency to establish the case for this authority, doubts regarding the existence of "gross benefits" could result in a finding that no such authority exists as a matter of law.[276] *Alabama Power* appears, however, to have contemplated that the consequence of the exercise of de minimis authority would be the absence of "regulation." Yet, as noted above, the de minimis concepts as they are applied to DSO and jail removal do not accept the status quo but rather require further state efforts to attain 100% compliance as a condition for continued funding under the de minimis concept.[277]

This rather lengthy examination with regard to the applicability of *Alabama Power* to the office's use of the de minimis concept yields only uncertainty: it is simply not clear whether a court confronted by a challenge to the office's exercise of that authority and relying on the *Alabama Power* "test" would invalidate the Office's de minimis policies as ultra vires. Yet *Alabama Power* appears to be the modern and accepted test for de minimis authority in the administrative area. Clearly the concern that underlies its narrow formulation (i.e., where regulation will yield trivial or no benefits) is genuine: too generous a concession of de minimis authority would permit agencies to rewrite congressional legislation based on cost/benefit calculations. This fear is no less relevant in the grant area, particularly with regard to a formula grant program like that administered by the Office where the policymaking discretion of the agency is, by design, small to start with. This is a classic "slippery-slope" problem and line drawing must, of necessity, be rather arbitrary if any line-drawing is in fact to be permitted.

Nevertheless, it is easy to be sympathetic to the notion that incarceration of a small number of juveniles in violation of the mandates should not mean that many important and useful state and local programs for the improvement of the juvenile justice system and prevention and treatment of delinquency will lose necessary funding. The case for the Office's authority to overlook such violations in its grant award decisions clearly strengthened by its insistence that continued eligibility for funding requires a showing of progress towards 100% compliance. Moreover, once compliance is achieved, there remains the problem of its maintenance. It would be unreasonable not to expect some "backsliding" due to circumstances over which the state may lack substantial control. Consistently over the years Congress has been receptive to arguments for recognizing good faith efforts by states to meet the mandates and has also recognized the need for a "rule of reason" with regard to at least some parts of the formula grant program. This too suggests that literalism in the Office's enforcement efforts may be inappropriate.

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[276] *See, e.g.,*, Natural Resources Defense Council, Inc. v. EPA, 966 F.2d 1292, 1306 (9th Cir. 1992). Sierra Club v. EPA, 719 F.2d at 463; Environmental Defense Fund v. EPA, 636 F.2d 1267, 1283-84 (D.C. Cir. 1980).

[277] See text at notes 174-75, 187 *supra*.

c. Analysis of Office's De Minimis Standards

At this point we will examine various aspects of the DSO and jail removal de minimis standards in light of the foregoing arguments for some administrative leeway in determining compliance with the mandates.

1. Numerical Standards.

Both DSO and jail removal standards include statistical measures for determining de minimis levels of noncompliance, calculated on an annual basis. The former ranges from 5.8 to 29.4 instances of institutionalization per 100,000 population under the age of 18.[278] The latter does not rely on a range. Rather, 9 instances of jailing per 100,000 of juvenile population constitutes the touchstone.[279]

In arriving at a statistical measure of "de minimis" violations, two general approaches might be taken. The first would be to determine whether a particular number of violations was "minimal" in quantity in some absolute sense. The problem with this is the lack of any standard whatsoever--other than pure intuition. ("I know it when I see it.") The second, and arguably preferable, method would be to rely on some point of reference, that is to say, to determine what is "minimal" in comparison to some known reliable statistic of relevance.

It is this latter approach that OJJDP adopted by relying on what it deemed adequate monitoring data indicating how many youths were securely held or jailed in those states which held the least number.[280] However, the conceptual difficulty with OJJDP's choice of a comparative baseline is its implicit acceptance of violations of the statute as permissible in some sense--which they are not. In other words, that state A has no more violations than state B and that state B is better in terms of compliance than most other states does not necessarily suggest that the levels of noncompliance of states A and B are minimal in the ordinarily utilized sense of that word. Moreover, it is not clear why the point of comparison picked by OJJDP focuses on the states' population of all juveniles, including even those who have not been securely held, jailed, or even taken into custody.

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[278] See text following note 175 *supra*.

[279] See text following note 185 *supra*.

[280] See 46 Fed. Reg. 2567; 53 Fed. Reg. 44371.

Other comparative baselines could in fact be considered. For example, for DSO one such point of comparison might be the population of juveniles in the state that applies for a de minimis finding who were alleged or adjudicated status offenders and nonoffenders and who were taken into custody over the period of 1 year. In the case of jail removal the baseline might be juvenile offenders (whether status or otherwise) taken into custody over that same period of time.[281] At least these measures do not implicitly accept as a given a certain level of mandate violation. Whatever the baseline chosen, it should probably be updated on a yearly basis or some regular interval of time, something that is not currently done with regard to the OJJDP de minimis standards.[282] Unfortunately, whatever comparative baseline is chosen, determinations of what number is "minimal" are, in great degree, arbitrary by nature. The courts are likely to defer to agency judgment if that falls within a "zone of reasonableness."

In sum, while the Office's choice of a numerical approach to de minimis is appropriate, its selected basis for comparison and refusal to revise that basis regularly are open to some question. It is, however, next to impossible to determine in advance whether a court would view the OJJDP's existing statistical measures of de minimis as being within that "zone of reasonableness."

2. *Violations of State Law and Unforeseen Circumstances*

All de minimis standards used by the Office acknowledge that some holding of juveniles may occur in violation of state law or policy and that this requires special treatment.[283] With regard to jail removal (as well as separation[284]) the Office has not subjected this category of mandate violation to a numerical standard, though it does require that there not be evidence of a "pattern or practice" of violation of state law or policy,[285] thus implicitly limiting the likely number of countenanced violations. With DSO, the statistical measures of de minimis do in fact count even these instances of random violation of state law as well as those constituting a "pattern or practice."[286] Elimination of this category of mandate violation may be all but impossible if only because many of the violations may be due simply to mistakes made by arresting officers or other officials (some of whom may be new to their jobs and unfamiliar with applicable requirements). Alternatively, such violations may be necessitated by unusual circumstances, such as the need to securely hold a status offender beyond the permitted 24-hour period for his or her own protection. In fact, even under *Alabama Power*, to the extent it is deemed impossible as a practical matter for a state to eliminate all noncompliant instances, there may be implied de minimis authority to encompass these situations since termination or threatened termination of a grant would seem to create no benefits whatsoever, only losses to the juvenile population in terms of available programs.

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[281] During 1988, approximately 834,985 juveniles were taken into custody, 65,263 in adult jails alone, that is at a rate of 3,230 per 100,000 of juvenile population (or 255 per 100,000 for those in adult jails). See B. Krisberg, et al., Juveniles Taken into Custody: Fiscal Year 1990 Report (Sept. 1991) at Tables 1, 2 & 3. It is not clear what percentage of these were status offenders and nonoffenders and what percentage were accused or convicted delinquents.

[282] *See* text following note 177 *supra*.

[283] *See* text at notes 173, 182 *supra*.

[284] *See* text at note 128 *supra*.

Moreover, the Office does not accept this type of violation as a "given" to be tolerated without the need for remedial action. Rather, it requires that existing mechanisms for the enforcement of state law be such that reoccurrence of violation be unlikely (separation and jail removal)[287] and that the state develop a plan to eliminate these instances (DSO and jail removal).[288]

3. *Progress and Backsliding*

Insistence that the "status quo" is not acceptable and that the state provide some assurance that it can do better in the future is mirrored also in the Office's requirement that a state develop a plan to eliminate even the nine or less violations of the jail removal requirement[289] and the general requirements which apply to both DSO and jail removal (when compliance status is determined by the numerical measure) that the state show progress toward 100% percent compliance in order to retain eligibility for continued funding.[290]

In point of fact, determining the existence of "progress" opens the way for the exercise of some discretion. For example, the monitoring reports for 1 year may indicate 10 instances of incarceration of status offenders spread throughout the state. The next year's report might show 12 or 13 such instances but all concentrated in one or two judicial districts where a particular judge or judges resistent to the mandates may preside. In the Office's view this may constitute "progress," since the violations are concentrated in only one or two areas of the state. In other words, progress is unlikely to be viewed strictly in terms of a relentless reduction in individual violations each year, nor should it as a practical matter.

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[285] *See* text at notes 128 and 182 *supra*.

[286] 46 Fed. Reg. 2567-68.

[287] 28 CFR 303(f)(6)(ii)(B)(4); (f)(6)(iii)(C)(1)(iv) (1991).

[288] 28 CFR 303(f)(6)(iii)(C)(1)(v) (1991); 56 Fed. Reg. 2568.

[289] 28 CFR 303(f)(6)(iii)(C)(2)(ii) (1991).

[290] 28 CFR 303(f)(6)(iii)(C)(2)(iv) (1991); 46 Fed. Reg. 2566.

Moreover, the de minimis standards should be and are in fact applicable to protect funding in the case of a state's backsliding in maintaining compliance due to unusual circumstances or circumstances effectively out of its control. For DSO purposes, those might include the holding of federal wards or out-of-state runaways.[291] And with respect to all three mandates, mistakes at the local level or exceptional situations may occur and yet some leeway for forgiveness should be available.

4. *"Recently Enacted Changes in State Law"*

The most dubious aspect of the DSO and jail removal de minimis standards are those provisions that permit continued funding where the numerical minima have been exceeded, perhaps in very significant degree. In those instances the Office requires that the state have recently enacted changes in state law which will "have a substantial, significant, and positive impact on the State's achieving full compliance" with the DSO mandate "within a reasonable time"[292] and on the "state's achieving full (100%) compliance or full compliance with de minimis exceptions" with the jail removal mandate "by the end of the monitoring period immediately following the monitoring period under consideration."[293]

These standards may in fact accommodate numbers of violations which could be regarded as far from "minimal." For DSO, the date of final compliance is placed somewhere within a "reasonable" period of time. Moreover, while the jail removal de minimis looks toward full compliance by the end of the next monitoring period, its language appears to allow for continued funding even when possibly substantial doubts remain regarding the ability of a state to achieve compliance within that timeframe. It appears that in some cases, such as Montana, the Office has accepted the mere enactment of jail removal legislation as sufficient in itself to justify a finding of de minimis full compliance despite the unlikelihood that alternatives to adult jails would be created in the near term. All the regulations require is that the recently enacted changes in state law have a "substantial, significant, and positive" impact on achieving compliance within a year, not that they by themselves assure compliance within that year.[294] When that next year's monitoring data are submitted and full compliance is not shown, however, at that point apparently the Office will not make a de minimis finding on the basis of "recent" changes in state law.

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[291] 46 Fed. Reg. 2567.

[292] 46 Fed. Reg. 2567.

[293] 28 CFR §303(f)(6)(iii)(C)(2)(iii) (1991).

Permitting continued funding on the "recently enacted state law" basis suggests more in the nature of a finding of "substantial" compliance.[295] It also bears a close resemblance to the administratively-imposed conditions for a waiver of full compliance with the jail removal mandate.[296] However, one of the *statutory* conditions for a waiver is the state's commitment of all formula grant funds to jail removal compliance,[297] something which is not an element of continued funding on a de minimis basis.

5. *Summary of Evaluation*

In sum, to the extent the Office applies "de minimis" standards keyed to the existence of "recently enacted law" which are not numerically limited, it will not only be permitting continued funding of programs which cannot qualify for a finding of substantial compliance (which is unavailable with regard to grant awards for fiscal years beyond 1989). It will also allow funding which would otherwise be permitted only under the conditions of a jail removal waiver. The DSO de minimis standard permits continued funding beyond the statutory final compliance dates.[298] In protecting state eligibility in this way while countenancing a seemingly significant number of mandate violations, the Office may be violating the JJDP Act.

On the other hand, some type of numerical standard for de minimis, the provisions discounting (within numerical or other strict limits) both violations of state law or policy and those caused by unavoidable or unforeseen circumstances, and the "progress" requirements are appropriate and should be deemed to be lawful exercises of the Office's discretion even if they do not fit within the Leventhal test for de minimis authority in *Alabama Power*.[299] However, the specific numerical measures chosen by OJJDP and the comparative baselines utilized might be subject to challenge.

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[294] *But see* 53 Fed. Reg. at 44371 ("This exceptional circumstance will only be applied where the legislation is expected to produce full (100%) compliance or full compliance with de minimis exceptions by the end of the monitoring period immediately following the monitoring period under consideration."). In a sense, this aspect of de minimis gives a state a "last chance" remedy to avoid termination or use of one of its limited number of waivers.

[295] *See, e.g.,*, text at notes 179-80 *supra*.

[296] *See* 28 CFR §303(f)(6)(D)(iii), (v) (1991) and text at notes 164-65 *supra*.

[297] *See* text at note 103 *supra*.

[298] In the case of the jail removal de minimis standards, the "recently enacted law" provision may not permit escape from the numerical measures of de minimis for two or more consecutive years. These provisions might, however, be invoked for a state, if not in successive years, then on several occasions over the years as backsliding develops.

Finally, it should be noted that the articulation and application of the Office's de minimis standards have apparently not provoked controversy in the states.

4. Substantial Compliance

Until recently, the Office's definitions of "substantial" compliance in the DSO and jail removal contexts were largely a matter of historical interest. Prior to the enactment of the recent amendments to the JJDP Act, for grant awards made for the 1991 fiscal year and beyond, relief on the basis of "substantial" compliance with the mandates was no longer available.[300] However, for those fiscal years prior to 1991 as to which findings of substantial compliance were relevant, the Office's legislative regulations either merely repeated the statutory conditions or elaborated on them in ways that seemed to fit comfortably within the statutory terms.[301] There was one exception to this: while the statute required (for jail removal purposes) removal of all status and nonoffenders from adult jails and lockups, the regulations created what amounted to a de minimis noncompliance standard for status offenders and nonoffenders securely held in violation of state law where there was no pattern or practice to violate that law.[302] However, based on the reasoning set forth previously,[303] there appears to have been a good argument in favor of this type of exception.

Otherwise, in administering the provisions for "substantial" compliance, the agency has exhibited some flexibility. Pennsylvania is a recent example. In determining whether the state had expended and would expend "an appropriate and significant" share of its formula grant funds to achieve jail removal,[304] the Office permitted the state to average its expenditures made in various years in such a way that it could achieve the requisite 40% of program funds.[305]

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[299] For articles dealing with issues of exceptions and waivers in other administrative settings, *see* Aman, *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277; Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through An Exceptions Process*, 1984 DUKE L.J. 163; Note, *Regulatory Values and the Exceptions Process*, 93 YALE L.J. 938 (1984). *See generally* Schauer, *Exceptions*, 58 U. CHI. L. REV. 871 (1991).

[300] See text following note 103 *supra*. But see text at note 403 *infra* discussing the 1992 JJDP Act amendments which reestablish "substantial compliance" as an extension mechanism.

[301] *See* text at notes 151-58 *supra*. The regulations for substantial compliance and waiver were further elaborated in OJJDP, Instructions/Alternative Substantive Compliance and Waiver of Termination (June 1985).

[302] 28 CFR §303(f)(6)(iii)(A)(2)(i) (1991).

[303] See text at notes 283-88 *supra*.

5. Waiver

The only express statutory limitation on the availability of waiver is that the waiver state agree to apply all of its formula grant funds (with certain limited exceptions) to achieve compliance with the jail removal mandate.[306] In recognition of the legislative history of this provision,[307] however, the Office announced its intention to limit waivers to "those situations where, although [full compliance has not been achieved], the state has made significant progress in removing juveniles from adult jails and lockups, and there is substantive evidence that additional funding is likely to produce further progress toward full compliance."[308] Most of the conditions added by the Office in its grant regulations to the eligibility for a waiver[309] are designed to reflect these congressional concerns.[310]

Prominent among the administrative conditions on the availability of a jail removal waiver is the three-waiver limit,[311] the basis for which the agency did not explain in the preambles to either the proposed or final grant regulations issued in 1989 (the last occasion to date for amendment of these regulations).[312] The legislative history of the waiver provision does not refer to such a limit. Obviously the Office believed that, without a limit, states might be encouraged to slow their efforts at compliance and that the initiatives at OJJDP to hurry compliance along would be undercut to some, perhaps a substantial, degree.

As it turns out, while a number of states will have the waiver mechanism available until Congress can complete reauthorization of the JJDP Act

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[304] See text at note 99 *supra*.

[305] 28 CFR 303(f)(6)(iii)(A)(2)(iv) (1991).

[306] See text at note 103 *supra*.

[307] See 54 Fed. Reg. at 32619-20.

[308] *Id.*

[309] *See* text at notes 160-61 *supra*.

[310] See 54 Fed. Reg. at 32619. In 1989, there were contentions made that the Office should require an "unequivocal" commitment to achieving full compliance with the jail removal mandate as a waiver condition, rather than a "mere" commitment. *See* 54 Fed. Reg. 32619. It was argued, inter alia, that "requiring a lesser commitment for a state in the context of an application for a waiver than is required for that state to achieve substantial compliance weakens the Act's compliance scheme . . . ." *Id.* The Office rejected this position.

[311] See text at note 163 *supra*.

[312] See 54 Fed. Reg. 14768-69 (April 12, 1989); 54 Fed. Reg. 32618-621 (Aug. 8, 1989).

(expected in 1992), several states will not be so fortunate, having reached the three-waiver limit prior to their application for the 1992 fiscal year grant awards.[313] This situation has created pressure on the Office to consider some type of modification to its three waiver limit.

It is difficult to summon an argument that the administratively imposed limits on the availability of waiver violate the JJDP Act. They appear to be entirely consistent with the pattern followed by both Congress and the Office in permitting extensions of deadlines for full compliance in the case of those states which have shown progress in the past and show a planned commitment in one way or another to achieve full compliance within a reasonably short period of time.[314]

6. A Recent Controversial Example of Administrative Discretion

While the same issue might have been presented outside the waiver context, one of the most controversial recent decisions by the Office arose from Wisconsin's application to remain a participating state. Its participation depended on its eligibility for a waiver. That eligibility turned on whether its plan for achieving the jail removal mandate was acceptable to the Office and that acceptability depended on the definition of "jail" employed by the Office.

As viewed by Wisconsin, the problem can be described as follows. It is a largely rural state with few counties having sufficient populations of juvenile offenders to justify the costs of separate juvenile detention and correctional facilities. Thus solution to the jail removal problem might require, among other things, the creation of regional facilities to which accused or convicted delinquents can be transported. The creation of those regional facilities is likely to be expensive. Moreover, it will require the cooperation of several of Wisconsin's counties, which are the dominant governmental structures in the state for many purposes and would have to take it upon themselves to finance the cost of these regional facilities. In addition, the counties might find it difficult to cooperate on this matter.

Consequently, the state, faced with the possible loss of federal grant funds for noncompliance with the JJDP Act, arrived at a plan whereby existing facilities housing adult jails could be modified to house juveniles in an assertedly separate part. In fact, early in the 1980s Wisconsin had proposed and the Office accepted as "jail removal" the location of a juvenile facility in the same building that housed an adult jail on the condition of "total separation" of those facilities, that is to say, different staff and different physical quarters for all activities.

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[313] See Appendix B, which is available upon request from the Conference.

[314] *See, e.g.*,, text at notes 153-58 *supra*.

As noted previously, in 1984 the Office formally adopted a definition of "separateness" which permitted so-called co-located juvenile and adult facilities.[315] Thereafter, whenever a state proposed a co-located facility, the Office emphasized the need for "total separateness" in terms of both staff and spatial areas utilized. On one occasion the State of Maine suffered a rejection of its jail removal plan for failure to satisfy these criteria.

In 1988 Wisconsin's jail removal plan proposed to the Office phased use of some spatial areas in the same building for both juveniles and adults and reliance on security staff available to serve both populations but on different days. Advised that this was unacceptable, the state notified OJJDP in June 1989 that it had decided not to participate further in the formula grant program. In the spring of 1990, however, following discussions with the newly appointed Administrator of the Office, the state requested that the Office again review its plan for compliance with the jail removal mandate. This time, following staff examination, a modified plan was found acceptable, apparently without consulting with OJP's Office of General Counsel in advance. In July 1990 Wisconsin notified the Office that it wished to resume participation in the formula grant program and later applied for its fiscal year 1989 allotment. On September 27, 1990 it also applied for a waiver. In October, OJJDP approved the state's waiver request and awarded the grant.

OJJDP's decision on the modified Wisconsin plan was premised on a view of the "jail removal" mandate which permitted staff and spatial area sharing under limited conditions.[316] This "interpretation" of the "separateness" definition found in the Office's formula grant regulations[317] was not formally issued as a "policy" statement until July 1991 in a memorandum from the SRAD Division Director addressed to SAG chairs, state juvenile justice specialists and others.

In making the decision on the Wisconsin waiver and in later issuing the policy statement, the Office did not engage in notice-and-comment procedures or otherwise formally consult with the National Coalition or the states generally. What "consultation" with outsiders did occur appears to have taken place in large part (if not entirely) after the decision was made on the Wisconsin waiver and in the form of telephone conversations initiated from the outside in reaction to the decision. The policy statement was not issued in the Federal Register but was to be made part of the agency's staff manuals.

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[315] See text at notes 137-41 *supra*.

[316] See text at notes 142-43 *supra*.

[317] See text at notes 140-41 *supra*.

For some states, such as Wisconsin, New Mexico and South Carolina, this policy statement is a welcome approach to the jail removal mandate because it recognizes the need for state flexibility and cost effectiveness. For others, like Maine, the recently articulated view is not only a change in the Office's position but perhaps an amendment to its regulations. More importantly, for them it effectively represents the abandonment of the jail removal mandate[318] and undercuts the efforts they have made over the years to convince their legislatures, sheriffs and police departments to remove juveniles from adult jails, establish entirely separate facilities, and/or seek solutions to treatment of juvenile crime that do not involve incarceration.

This is not the place to attempt to resolve whether the Office has in fact changed its regulations rather than "clarified" its views on the separateness criteria. Nor is it appropriate here to determine whether, regardless of the characterization of the recent policy statement, it is consistent with the statutory jail removal mandate or represents good social policy. These particular issues are not relevant to this study. Unfortunately, all of the heat generated by this case creates the danger that an overall judgment on the operation of the Office might be unduly affected by this one incident.

There are, however, problems implicating administrative flexibility and discretion illustrated by the Wisconsin case that are important for present purposes.[319] Many of those same issues arose in connection with another recent case: the Office's response to New Jersey's inquiry regarding the treatment of 18 year-olds initially sentenced by juvenile courts.[320] This should increase the Office's sense of urgency in dealing with these matters.

First, with regard to the need for predecisional consultation, it was apparent to the Office that an affirmative decision with regard to the Wisconsin waiver request would at least appear to be a fundamental change in its position. Moreover, that decision might undercut the efforts of many state juvenile justice officials and activists who had worked hard to remove juveniles from adult facilities and jail-like environments for many years and who had previously expressed objection to the Office's permitting any juvenile incarceration in the same facility housing an adult jail. The public controversy that ultimately arose was entirely predictable.

Whether the policy that was applied in the Wisconsin case is properly designated a "clarification" (as the Office characterizes it) or a change in its regulation or views is in large degree beside the point in addressing the need for prior consultation. Of course, as a legal matter, if it were a change in the regulations there might be some argument[321] that the Office was obliged to engage in notice-and-comment rulemaking prior to the final issuance of the "policy" statement, and arguably before the decision on Wisconsin's request since agencies are not at liberty to disregard their own legislative regulations.[322]

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[318] See text following note 55 *supra*.

[319] We have briefly touched upon some of these previously. See text at notes 206-40 *supra*.

[320] See text at note 228 *supra*.

But more importantly, it is simply not good administrative practice to omit consultation in the circumstances that confronted the Office in the spring and summer of 1990 when a review of an important and controversial policy was clearly in the works. The agency was denied the benefit of outside viewpoints which, though the content may have been anticipated by at least some in the Office, might have received more thorough consideration if formally solicited and received before the Office moved too far along in negotiations and discussion with Wisconsin. By the same token, some states and the Coalition would not have felt that their concerns--to say nothing of the jail removal mandate itself--were irrelevant to the Office. Appropriate consultation may have involved "formal" notice-and-comment procedures or less formal methods.[323]

The co-located facility issue is certainly a volatile one with a lengthy history. It would seem that it is just such issues that require fuller prior airing than afforded by the Office. In fact it may very well be that, had the Office directly involved the Coalition and other interested parties early on in its decisional process, it could have convinced them at least of its good faith in dealing with a difficult matter of interpretation and policy and thereby nurtured confidence in its stewardship.

Almost a year elapsed before the Office formally issued a policy statement that articulated its views on the meaning of its "separateness" regulation. This delay occurred while confusion reigned over what was the Office's policy and how to react to it in planning for compliance with the mandates. Delays of this nature in communicating policy to the states simply must be avoided. Moreover, as noted previously, the method ultimately chosen for making the Office's views publicly known was a memorandum distributed to agency staff and state officials. Yet, in the circumstances, publication of the "clarification" in the Federal Register may very well have been required.[324]

It is commonplace for agencies to change their policies and interpretations. That is obviously an important and legitimate aspect of their ability to respond to changed circumstances or new information. The courts, however, generally expect adequate explanations for these changes.[325] In the circumstances confronting the Office with regard to Wisconsin, where the Office knew that at least some outsiders would view its decision as a change, the Office should have explained in the policy statement more fully why it deemed it appropriate, in the context of the jail removal mandate and good policy, to construe its regulations in the manner set forth in the memorandum. This is true even if, as the Office claims, the "clarification" did not represent a real change in its position. Yet the Office merely offered its view of the meaning of the "separateness" regulation. An explanation has the functional significance of assisting those seeking to apply a policy to disparate circumstances and, more to the point here, may dispel fears of administrative arbitrariness and increase the perceived legitimacy of the agency's decision among those affected.[326] Moreover, as noted previously, state juvenile justice specialists have requested such clarifications in reasoning from the Office in the past.[327]

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[321] See note 219 *supra*.

[322] *See, e.g.*,, Montilla v. INS, 926 F.2d 162 (2d Cir. 162). *See generally* Note, *Violations by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629 (1974).

[323] See text following note 231 *supra*.

[324] See text at notes 235-40 *supra*.

Finally, the apparent post hoc involvement of the Office of General Counsel in the decisionmaking process in the Wisconsin case simply does not reflect sound administrative practice. This is true even though, ultimately, a series of legal opinions supported the Administrator's decision. First, post hoc requests for legal opinions inevitably place attorneys in a position where there are pressures of various kinds that may limit the ability of the attorney to fully explore all aspects of a problem with appropriate objectivity. Second, even if the attorney warns of the possible adverse impact of a proposed course of action or expresses his or her considered opinion, that opinion may not have the effect it might otherwise have on the decisionmaking process.

Unfortunately in the case of OJJDP, there have been occasions in the past when the Office of General Counsel of OJP has not been able to offer its services to OJJDP staff. Apparently this has at times, at least, been the result of decisions within OJJDP itself. Clearly the lack of an assured source of predecisional legal and other advice from an attorney or attorneys can be a source of significant problems. Apparently there is a staff attorney position in OJJDP[328] which remains unfilled because of decisions of OJP. This position should be promptly filled to assure the Administrator and the Office's staff ready access to general program legal advice when needed and to serve as a liaison in seeking appropriate legal opinions from the Office of General Counsel of OJP.

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[325] *See, e.g.,*, Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983); International Union, United Automobile Workers of America v. NLRB, 802 F.2d 969 (7th Cir. 1986).

[326] *See generally, e.g.,*, Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978).

[327] See text at notes 245-46 *supra*.

[328] See 42 U.S.C. §5612(a) (Administrator specifically authorized to employ attorneys).

E. Monitoring

1. Overview

If the mandates were to be taken seriously by the states, there had to be detailed monitoring of public and private secure facilities, including jails and lockups. The JJDP Act imposed this obligation on the states along with the duty to annually report to OJJDP the results of the monitoring[329] and further mandated that OJJDP determine that the monitoring systems employed were adequate.[330] Since the number of facilities that would have to be included in the "monitoring universe" might in some states far exceed 100 and monitoring would have to cover 24 hours a day, the task facing states was indeed formidable.

Moreover, the mandates, as elaborated by the Office, required that data-gathering systems obtain very detailed information regarding the custodial status of juveniles and other related matters. For example, monitoring records must indicate whether accused status offenders are held for more than 24 hours in secure detention facilities or, if in excess of 24 hours, pursuant to a valid court order as defined by OJJDP regulations. Those records must also show whether accused delinquents are held securely for more than 6 hours in adult jails and lockups. Such records must in turn reflect the fact that "secure" custody is defined in part by distinguishing between cuffing to "stationary" and nonstationary objects and the presence or absence of continuous visual observation.[331]

Violations of the mandates so construed would, moreover, not make a state ineligible for future grant awards if the instances of noncompliance were statistically "de minimis" under the Office's published standards. Application of those "exacting" tests to data bases that did not accurately reflect what was occurring in secure facilities would obviously make no sense.

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[329] 42 U.S.C. §5633(a)(15).

[330] See text preceding note 108 *supra*.

[331] *See, e.g.*,, text at notes 146-50 *supra*.

2. Deficiencies in Monitoring Systems

Given the magnitude of the monitoring task, it should come as no surprise that state monitoring systems are uneven in their capabilities and reliability. Over the years between 1978 and 1991, no less than four studies by the General Accounting Office found that local records, on which monitoring reports to OJJDP are based, were either inaccurate or incomplete.[332] It was on the basis of the 1984 GAO report that Congress amended the JJDP Act in 1984 to require the Office to audit state monitoring systems since prior to that time OJJDP had not apparently evaluated the reliability and validity of the data that were submitted as part of monitoring reports.[333]

Between 1985 and 1988, the Office conducted audits of almost all states' systems, an effort which was apparently so resource-intensive that performance of many of SRAD's other tasks were significantly delayed. The Office's policy has been to reaudit each system every 5 years on a phased-cycle requiring that a certain number of states be examined each year. The first round of audits identified problems, particularly with regard to data collection and verification in many of the systems.[334] The experience in the aftermath has varied among the 10 states visited during the course of this study. Some of the states have been slow in responding to the audit recommendations and the Office has not consistently followed up with the states. Some major identified problems in the monitoring systems remain unaddressed or unremedied.

What is sometimes referred to as the "fourth mandate," that states "provide for an adequate system of monitoring" for compliance, is obviously interpreted by both Congress and the Office in the same fashion as the separation mandate,[335] that is, there is no fixed deadline for the creation of a fully adequate system but rather a state should show a good faith and steady effort to improve its monitoring to the point that it is fully adequate.[336] It is interesting to note, however, that OJJDP on its own added to the conditions for a jail removal waiver a requirement that the state have "achieved" compliance with the monitoring mandate.[337] However, this provision may not be applied literally by the Office since it apparently finds the requirement satisfied even when major identified deficiencies still exist. There must be a plan and evidence of a commitment to fix the deficiencies.[338]

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[332] *See GAO Valid Court Order Report*, note 63 *supra* (focusing on valid court order data); Better Monitoring and Recordkeeping Systems Needed to Accurately Account for Juvenile Justice Practices GAO/GGD-84-85 (July 9, 1984); Improved Federal Efforts Needed to Change Juvenile Detention Practices GAO/GGD-83-23 (March 22, 1983); Removing Status Offenders from Secure Facilities: Federal Leadership and Guidance are Needed GGD-78-37 (June 5, 1978).

[333] See text at notes 108-09 *supra*.

[334] *See GAO Valid Court Order Report*, note 63 *supra*, at 29. For example, OJJDP recommended that 22 states improve their data collection procedures; 30 states improve data verification procedures; 29 states revise their procedures for identifying detention facilities; and 20 states change their procedures concerning the length of secure detention. *Id.*

[335] See text at note 81 *supra*.

[336] *See, e.g.*,, 28 CFR §303(f)(1)(ii) (1991) (state to indicate barriers to compliance with monitoring mandate and a plan to overcome them).

Creation of adequate monitoring systems will be expensive. In fact, several states are now committing tens of thousands of dollars (sometimes over $100,000) of their limited formula grant funds to create and maintain such systems. The JJDP Act expressly limits the use of formula funds for "monitoring" to 7½% of the total annual allotment to a state.[339] However, this provision has been interpreted by the Office as applicable to monitoring financial controls, not monitoring for compliance with the mandates.

The history to date suggests that if Congress seriously desires that there be adequate state monitoring for compliance with the mandates (something that presumably must continue even after "full" compliance is achieved), it will have to ensure that states have adequate financial resources to do the job well and that OJJDP has sufficient staff, travel funds, and other assistance to audit state monitoring systems on a reasonably regular basis without neglecting its other assigned tasks.

Some argue that the effort necessary to establish adequate monitoring is not cost effective and that scarce money is being taken from substantive juvenile justice projects to fund processes and procedures that have value "only" to determine compliance status. However, others familiar with the monitoring process have justified it in terms that go beyond the oversight needs of OJJDP. Specifically, monitoring visits to local facilities can be useful in determining other juvenile justice needs and the general conditions of confinement. The data collected can also be used to establish strategies for compliance with the jail removal mandate and the state's own policy objectives in the juvenile justice area. For example, such information may shed light on whether the population of juveniles securely detained in a particular area justifies a separate local secure detention facility or, rather, a regional one. In addition, data on the extent and nature of the jailed juvenile population might suggest that detention screening criteria are inadequate.

A number of the states visited have used data derived from monitoring for these and other purposes which they believed are worth pursuing in their own right. Interestingly, the cost of monitoring systems to a number of agencies administering the formula grant program were reduced since other state agencies, such as a Department of Corrections, had the statutory duty to collect much of that data anyway.

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[337] *Id.* §303(f)(6)(D)(1)(iv); (f)(6)(D)(2)(vi) (1991).

[338] *See* United States Department of Justice, OJJDP Guideline Manual: Audit of Compliance Monitoring Systems, OJP M7140.7 (Nov. 6, 1987), ch. 2 at pp. 17-18.

[339] 42 U.S.C. §5632(c).

3. Monitoring Reports

There is no question that the collection of data and translation into a format acceptable to the Office is an endeavor that consumes the time available to the limited state staffs assigned to deal with the formula grant program. In apparent recognition of this, Congress in 1980 amended the JJDP Act to provide that the requirement for annual monitoring reports would not apply to those states: (1) found to be in compliance with the DSO, separation and monitoring mandates; (2) having legislation implementing those requirements; and (3) having adequate enforcement mechanisms to ensure that that legislation would be administered effectively.[340]

In only one case has the Office ever excused the submission of state monitoring reports under this provision. The state was Pennsylvania, which was considered to be in the forefront of states in terms of its progress toward enlightened treatment of alleged juvenile offenders. As it turns out, the decision was an unmitigated disaster from the points of view of both the state and OJJDP. Not having to submit annual monitoring reports apparently resulted in diminished vigilance by the state in its efforts to maintain compliance with the mandates. It also meant that no one outside the state agency was in a position to raise questions regarding the type and sources of data being supplied to the state by local officials. In connection with a site inspection by the Office, the Pennsylvania agency discovered that the police lockups in Philadelphia in fact held juvenile offenders in violation of the mandates and in great numbers. From a position of assumed full compliance, the state was plunged into a frantic effort to solve its jail removal problems and with less time to accomplish that objective than would have existed had the problem been discovered sooner.

Not only is a waiver of annual monitoring reports fraught with dangers of the type that materialized in Pennsylvania, but it is questionable how much state effort is saved by such a waiver. After all, the statute does not excuse the maintenance of an adequate monitoring system and its maintenance presumably requires the keeping and reporting to the state of detention and other data. If the state has that data, it is difficult to summon an adequate justification in cost/benefit terms that the information could or should not be furnished to OJJDP for its own oversight use, though there may be ways to simplify the reporting format. The Pennsylvania experience clearly suggests the value of such oversight in assuring the maintenance of the mandates.

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[340] See text at notes 105-07 *supra*.

If Congress is serious in its desire for adequate state monitoring systems and compliance with the mandates, the funds necessary to cover the cost of preparing annual monitoring reports should be deemed well spent. If those funds are not now adequately provided by existing appropriations, those appropriations should be correspondingly increased. Alternatively, since monitoring may serve state needs that are distinctive and perhaps beyond the scope of mandate compliance, Congress could impose some type of matching requirement on the states to assure that adequate monitoring and reporting systems are in place. In the process, Congress should repeal the provision of the Act which permits waiver of annual state monitoring reports.

4. Monitoring Coordination within OJJDP

The required submission to and analysis of state monitoring reports by OJJDP for compliance purposes and, thereby, for determinations of state eligibility for future grant awards raises questions regarding the mechanisms in place in the Office to assure a uniform evaluation of the reports and data collected.

The application of at least the strictly numerical de minimis standards[341] may not implicate substantial administrative discretion and, thereby, create the risk of inequality in treatment of states. In fact this study identified neither allegation nor proof of such inconsistent treatment, though it bears noting that the research on this point was largely anecdotal and based on interviews rather than a review of grant files.

The nonnumerical aspects of the de minimis standards (e.g., the exceptions for "recently enacted law" promising full compliance[342]) are another matter in terms of their potential for idiosyncratic application. However, at least for the past few years until the summer of 1991, this potential for inconsistency was minimized considerably by the existence of a position in the Office for a monitoring coordinator who, in conjunction with each state representative, would in effect make all determinations of de minimis compliance. Recently, the individual who filled that position left the agency. Moreover, the position was abolished, with the responsibility for at least initially making determinations of compliance status vested solely in the state representative teams for each region of the country.

There is, of course, the possibility for some limited substantive review by the Division Director. However, his or her duties are sufficiently extensive that such review power is unlikely to be exercised except in the most unusual of circumstances. Such review might be triggered by a state's complaints regarding its treatment. But, absent widespread availability of state-submitted compliance data outside the Office--something which does not now exist--few states will be in the position to judge their comparative treatment and complain on the basis of inconsistency.

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[341] See text preceding note 176 and text at notes 185-86 *supra*.

[342] See text preceding note 186 *supra*.

Even the elimination of the nonnumerical aspects of the de minimis standards for DSO and jail removal whose legality is questioned by this study (i.e., the "recently enacted law" provision)[343] would leave undisturbed the other nonnumerical aspects and the multi-factor balancing of the current DSO standard.[344] Unacceptably high risks of inconsistency in its ad hoc application remain. Moreover, during the period for which findings of nonnumerical "substantial" compliance with the jail removal mandate[345] would permit continued funding, there clearly existed those same risks given the nature of the criteria applied (e.g., "meaningful progress" in jail removal, "diligence" in carrying out jail removal plan).[346] Until the recent amendments to the JJDP Act, "substantial" compliance had become more a matter of historical, rather than contemporary, significance,[347] though now it has been given new life.[348] In addition, the administrative conditions imposed on the availability of jail removal waivers[349] mirror many of the statutory conditions for nonnumerical "substantial" compliance,[350] thereby creating opportunities for the exercise of significant administrative discretion. In addition, a review of waiver of termination memoranda suggests that, in relation to the monitoring system condition for a waiver,[351] the Office has clearly accepted less than full compliance despite the literal language of its own regulations.[352]

It also appears that on occasion the Office has made exceptions to the type of database a state must submit in order to satisfy the monitoring report requirements. For example, in 1990 the state of Pennsylvania submitted only four months of data relating to police lockups in Philadelphia, rather than the six months required by the agency's grant regulations.[353] Apparently the

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[343] See text at notes 292-99 *supra*.

[344] See text at notes 173-76 *supra*.

[345] See text at note 99 *supra*.

[346] See *id.* and text at notes 151-58 *supra*.

[347] See text following note 99 *supra*.

[348] See text at note 403 *infra*.

[349] The waiver mechanism will become unavailable for fiscal years after 1993 as a result of the recent amendments to the JJDP Act. See text at note 402 *infra*.

[350] See text at notes 164-66 *supra*.

[351] See text at note 164 *supra*.

[352] *See also* text at notes 334-38 *supra*. Waiver of termination memoranda covering seven states' eligibility for a FY 1990 waiver were reviewed.

[353] See text at note 195 *supra*.

Office ultimately either "waived" the application of its regulation or created some new "de minimis" rule and, therefore, accepted the information as sufficient for a determination of "substantial" compliance with the jail removal mandate. Whether or not such action was legally permissible, clearly such "exceptions" to the legislative regulations or other policies of the Office must be clearly explained, documented and made known both within and outside of the agency in order to ensure equality of treatment.[354]

In sum, there should be a person in the Office who has as one of his or her important responsibilities the job to review in some depth findings relevant to substantial compliance, de minimis full compliance, and eligibility for a waiver and to assure an even-handed evaluation and treatment of monitoring reports. The existence of such a monitoring coordinator can ensure that Office policies (including provisions for exceptional circumstances) with regard to acceptance or rejection of submitted data are consistently applied. Also, as noted previously in this report, the prior monitoring coordinator was given duties sufficiently expansive that he could exercise an informed judgment with regard to the need for new Office policies where issues affected more than one state.[355]

In addition, the Office should make efforts to ensure that the state-submitted data and other information by which it determines compliance and waiver are more widely available both to states and the public generally. This can provide a supplementary check on inconsistency in treatment of states.[356]

F. Personnel Resources

The adequacy of the performance of state representatives in OJJDP is crucial to the successful administration of this formula grant program.[357] Accordingly, the failure to fill these positions, frequent staff turnover or modification of staff responsibilities, and lack of relevant prior experience and subsequent training for those performing as state representatives must be a cause for grave concern. Unfortunately, the Office has had to live with all of these problems over the years. It has recently made efforts to solve them, though some issues remain unaddressed today and the solutions proposed for others are only now being tested for their adequacy.

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[354] See text at notes 232-46 *supra*. In fact there was a General Counsel opinion on the Pennsylvania monitoring de minimis policy which carefully evaluated its legality. *See* Memorandum to Robert W. Sweet, Jr., Administrator OJJPP, from John J. Wilson, Associate General Counsel, Application of Six Month Monitoring Data Requirement to City of Philadelphia Lockups (April 30, 1990). This memorandum had not appeared in agency staff manuals as of September 1, 1991.

[355] See text preceding note 201 *supra*.

[356] This should be the case regardless of the applicability of any exemptions from the public disclosure requirements of the Freedom of Information Act. *See* 5 U.S.C. §552(b). The only one even arguably applicable is (b)(7) dealing with "investigatory records compiled for law enforcement purposes."

[357] See text at note 36 *supra*. *See also* Mason, *supra* note 72, at 104 (indicating the need for the monitoring Federal agency to offer help to the grantee to "set its house in order.").

1. Staff Levels

In 1990 the Department of Justice's own Justice Management Division issued a report[358] which indicated efforts in the Office of Justice Programs to hold down staffing levels in OJJDP,[359] as well as other parts of OJP. While noting that "OJP leadership has held the view that existing human resources have been underutilized,"[360] the report further observed that "[l]ine workers, however, indicated that they are overburdened and need additional resources to do an adequate job."[361]

One of the positions in OJJDP which has not been filled in recent years has been that for a general attorney. We already have suggested that this position should be filled.[362] In addition, in the recent past, state representative positions have remained vacant for long periods of time.

2. Personnel Turnover and Reassignment

It also appears that the Office has gone through at least two "waves" of staff turnovers, which have brought into the state representative position people without prior juvenile justice or other relevant experience and training. One of these occurred during the phased elimination of the Law Enforcement Assistance Administration in the early 1980s with the accompanying reduction-in-force of some OJJDP personnel.[363] The other, more recent episode of staff turnover has occurred since 1989, as longtime state representatives and their supervisors have either left the Office or taken positions elsewhere in the agency. The Justice Management Division study of 1990 indicated, without referring specifically to OJJDP, that low morale might be a significant cause of the large staff turnover suffered by OJP in general.[364] At OJJDP, the lack of Presidential support for continuation of the formula grant program, along with the approach to human resources which has characterized the Office's personnel policies described below, could be potent causes for what appears to be the low morale among state representatives.

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[358] JMD Report, note 32 *supra*.

[359] *Id.* Figure 4.

[360] *Id.* at 24-5.

[361] *Id.* at 25.

[362] See text following note 327 *supra*.

[363] The RIF, as it effected OJJDP, was the basis for litigation described in Andrade v. Lauer, 729 F.2d 1475 (D.C. Cir. 1984).

Even when employees have remained as state representatives for several years, the states for which they have responsibility have been changed frequently. Based on state representative assignment information provided by SRAD, on average a state had about three different OJJDP representatives between January 1986 and August 1991. In fact, one-third of the states and territories had four or more representatives over that same 5-1/2-year period. In contrast, based on information obtained from the state specialist survey, current state specialists have been in their positions for an average of 5-3/4 years, with one-third exceeding 7 years on the job.[365]

Whether the changes in state representatives can be traced to people leaving or merely being shifted around, this process has been frustrating for both the representatives themselves and, as the survey of state juvenile justice specialists for this study indicates,[366] for the states as well. It has clearly been very difficult to develop and nurture productive and confident working relationships between state agency specialists and their designated federal liaison in the Office. Moreover, at least some state representatives could not acquire more than a passing knowledge of the problems facing their states, knowledge which is crucial to providing needed technical and other assistance, as well as to determining with some confidence the compliance status of the states, including eligibility for waiver and other types of relief. This problem has been compounded by budget difficulties which have led to restrictions on travel, permitting little or no opportunity for state representatives to visit states. Finally, personnel rotation has increased the chances that a state might get inconsistent advice regarding the requirements of the formula grant program from different persons serving as its state representative.

3. Staff Technical Background and In-Service Training

Foreclosure of the opportunity to develop a substantial base of experience through day-to-day work with particular states has compounded a related problem that afflicts the Office; that is, lack of juvenile justice experience among the ranks of the state representatives.[367] In examining the various types of determinations that must be made by the Office in administering the formula grant program, it seems readily apparent that some technical background in the area of juvenile justice is clearly to be preferred, if not required, for someone in the state representative position. First, position descriptions for a state representative clearly contemplate his or her provision of technical assistance to states in planning for compliance.[368] Moreover, it would be difficult for someone unfamiliar with the basic techniques and processes for dealing with juvenile offenders to offer sound professional judgment regarding the acceptability of state plans for coming into compliance with the statutory mandates and the adequacy of state monitoring systems, to name only a few areas of critical importance to the formula grant program. Merely reading the regulations and staff manuals prepared by the Office certainly will not convey anything more than a general and rather abstract checklist of required information.

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[364] *See* JMD Report, *supra* note 32, at 22.

[365] See Appendix D3 at 1, which is available upon request from the Conference.

[366] See Appendix D3 at 1-2, 4, which is available upon request from the Conference.

Recent vacancy announcements for the position of state representative have listed "knowledge of juvenile justice issues and programs relating to the criminal justice field" as a "ranking factor," something which has not always been so identified.[369] Beyond that, however, the Office has not focused on building up the type of juvenile justice expertise within the state representative group that a formula grant program of this nature needs.[370] Its success depends at least as much on cooperative federal/state efforts to solve perceived juvenile justice problems as on federal "enforcement" of statutory and regulatory requirements. Yet lack of adequate background and training substantially interferes with the development of such a cooperative relationship.

There is, for example, no in-house formal training program dealing with issues of juvenile justice for state representatives. What formal training they receive occurs during their attendance at workshops conducted by the Office's technical assistance provider, Community Research Associates, for state juvenile justice specialists. Yet, what state officials need to know about the formula grant program is not always the same type of information required by those with oversight responsibilities. Moreover, those workshops are not designed to give state representatives the type of general exposure to juvenile justice issues which many of them may lack. Several of the interviewed state representatives indicated that they still regarded themselves as novices after as much as 2 years on the job. Despite the crucial importance of well-trained state specialists to the success of the formula grant program, there is every reason to believe that OJJDP state representatives require at least the same quality of in-service training. This is particularly true given the fact that the technical background of state specialists appears to be more extensive[371] than that typically possessed by recent state representatives.

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[367] Our interviews with the current state representatives focused in part on their education and job experience.

[368] State Representative Roles, *supra* note 36, at Intro. 4.

[369] The authors examined several recent vacancy announcements for state representative, including one dated October 1, 1990, which did not contain the noted ranking factor found in the announcement of September 20, 1991.

[370] This was the upshot of the various interviews we conducted at OJJDP and with others knowledgeable about its operations over the years.

The Office's recent establishment of a regional/team approach to assignment of responsibility for states may improve matters in a variety of ways, assuming the composition of the teams is not changed frequently. The membership on a team is supposedly composed of one seasoned state representative and one with less experience. The former may act as the "mentor" of the latter. At least if difficult problems arise, the less experienced member will have the benefit of the other's knowledge of the program. The team's focus on a particular region of the country may also be helpful to the newcomer to the extent the states in the region share the same types of juvenile justice problems and/or institutional responses to those, thus economizing on the amount of information he or she must absorb. It should also be noted that this regional approach has been fashioned in such a way as to fit with the regional structure of the National Coalition of State Juvenile Justice Advisory Groups and the operation of the technical assistance provider, Community Research Associates. This may facilitate a more coordinated and knowledgeable federal/state relationship.

4. Workload

The team approach may also assist in dealing with one of the other problems which has affected the Office's operations, that is, the size of its workload. The official description of the state representative position is both impressive and, for those willing to take the job, formidable.[372] Their oversight and liaison roles require not only work in Washington but site visits for program evaluation and auditing purposes or when other special circumstances warrant. Moreover, the assignment of responsibilities beyond those identified as distinctive of a state representative, along with staff turnover and other changes in the Office, has only added to what many see as a serious problem of too much work and too little time to do it adequately.

Evidence that this problem exists is not difficult to uncover. As noted previously, the congressionally required audit of state monitoring systems in the late 1980s occupied much of the time of SRAD to the detriment of many of its other tasks.[373] Furthermore, the submission to OJJDP of required state reports has been uneven and there have been instances of no followup by SRAD or followup only after a substantial delay. The specialist telephone interviews indicate that Office procedures for written acknowledgement of receipt of state reports have not been met.[374] This may be proof of the workload problem, poor training, inadequate supervision or mismanagement.

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[371] See Appendix D3 at 1, which is available upon request from the Conference.

[372] See text at note 36 *supra*.

To say nothing of the frustration of the state representatives who are not able to carry out their functions adequately, these failures to respond and delays anger state officials who spend much of their time preparing reports to OJJDP. It contributes in no small degree to cynicism among state juvenile justice specialists regarding the work of the Office and the ability to find a helpful presence in Washington. The Office's workload has also meant that, rather than taking a "proactive" position with regard to state problems of compliance and otherwise, state representatives have found themselves largely in a reactive mode, making visits to states (where travel budgets and other work permits) only in response to problems after they have arisen.

5. Summary

In short, many of the Office's administrative difficulties over the years have been rooted in its lack of a staff of adequate size, training, and continuity to do the work assigned. To the extent that the program has been as successful as some observers believe it has been, it is a tribute to those in OJJDP who have dedicated a substantial portion of their careers to the achievement of the mandates as well as to those state officials and private groups that have both followed the federal lead and taken the initiative in attempting to achieve the goals established by Congress in 1974 and 1980. The delays and problems that have, however, accompanied progress might have been avoided or at least mitigated had these issues of staff support been more adequately dealt with.

G. Problems of Coordination

These are generally of two types: first, provision of information; and, second, use of federal funds within the control of the Office in solving juvenile justice problems. To many observers OJJDP has been deficient with regard to both.

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[373] See text preceding note 334 *supra*.

[374] *See, e.g.*,, Appendix D3 at 2-3 (indicating lack of acknowledgement of reports submitted) and State Representative Roles, *supra* note 36, at I.1-IV.4 (noting requirements for such acknowledgements). Appendix D3 is available upon request from the Conference.

Despite the fact that the JJDP Act is filled with references to the Office's authority to disseminate information relating to juvenile justice and promising programs for delinquency treatment and prevention,[375] one of the consistent complaints over the years and in the state interviews was the lack of such dissemination to states. More specifically, it is said that the Office does not readily communicate information relating to successful programs and projects instituted in one state that might have more general application in assisting efforts at compliance with the mandates. Ironically, the recent creation of a new "dissemination" unit within the Office was not even widely known among the states we visited. Moreover, there was little indication that the responsibility of a state representative to provide information about programs was taking place.[376] This is not to say that dissemination never occurs; rather that it may occur too infrequently.

In part the breakdown in communication may be traceable to the fact that state representatives are overworked and have in recent years been largely unfamiliar with state programs given their brief periods of assignment to a particular state. Their lack of background and training might, in addition, make it difficult for a state representative to discern which programs are successful for reasons that might make them transferable elsewhere.

There is also a persistent perception by outsiders that information generated by Office sponsored-research and "special emphasis" funding for delinquency prevention and treatment projects is not obtained by SRAD, or at least, is not communicated to the states when in fact it might be helpful to them in their compliance efforts. In point of fact, the JJDP Act requires that state planning agencies be afforded the opportunity to review and comment on applications for special emphasis funding under the Administrator's discretionary grant authority[377] and, further, that they be given copies of the regular reports sent to OJJDP on projects within their respective jurisdictions.[378] There have been allegations that these procedures have not been followed.[379] States feel that fulfillment of these duties is essential in order to assure that the discretionary funding authority is not used in ways which unintentionally duplicate or undercut state efforts funded by the formula grant program. The statute itself directs that, in making a special emphasis grant, the Administrator take into consideration "the extent to which such program meets the objectives and priorities of the State plan."[380]

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[375] *See, e.g.,*, 42 U.S.C. §5602(a)(4); §5652; §5653.

[376] *See* State Representative Roles, *supra* note 36, at Intro. 2, III.1.

[377] 42 U.S.C. §5665a(b)(5).

[378] *Id.* §5665a(b)(7).

[379] Letter of State Juvenile Justice Specialists to Terrence Donahue, Acting Administrator OJJDP (May 15, 1989).

The statute contemplates that discretionary monies may be used directly to aid compliance with the mandates.[381] There have been several instances over the years wherein such funds were devoted to jail removal efforts, as in the case of a regional facility study now on-going in South Carolina. Yet states continue to express their concern that, in view of the focus on meeting the jail removal goal, more of an attempt has not been made recently to use special emphasis funds in particular and discretionary funds in general for these purposes. It should be noted, however, that state officials appeared to be not well informed about the full range of the Office's discretionary projects and initiatives.

In sum, any efforts the Office is now engaged in to disseminate information to the states which might aid in their compliance efforts should be continued and, if possible, expanded. In addition, as the statute itself suggests, the Office should adopt procedures to ensure that its discretionary funding authority is not used in ways that undercut the purposes of the formula grant program. Whenever it is otherwise appropriate, those funds should be employed to further state plans for compliance with the mandates. Finally, as the statute requires, state specialists should be regularly consulted with and informed about projects in their jurisdictions supported by special emphasis funds. They should also be told about other discretionary projects funded by the Office that might be of value to them.

IV. Other Elements of the OJJDP Formula Grant Program

This study did not attempt to probe in depth the many issues that might be examined with regard to the role and operation of entities outside OJJDP which, by statute, have a special relationship to the formula grant program. Those entities include the state planning agencies, the state advisory groups, the technical assistance providers, the National Coalition of State Juvenile Justice Advisory Groups, and the Federal Coordinating Council. Nevertheless, some general comments can be offered.

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[380] 42 U.S.C. §5665a(c)(3).

[381] *See, e.g.,, id.* §5665(b)(6)(A).

A. State Agencies

With regard to the state juvenile justice specialists, both the telephone survey and the in-person interviews indicated that a very high level of substantive competence and dedication to the goals of the formula grant program existed among them. Many of the specialists have been frustrated over the years by a variety of developments and patterns of performance by OJJDP, many of which have been detailed earlier in this study. In some states that either have achieved compliance or are making substantial efforts in that direction, this frustration has led to a cynicism regarding the Office's relevance to what the state agency wishes to accomplish in the juvenile justice area.

Funding of the state programs at times has made it next to impossible for some state specialists to obtain travel authorization to one or more of the scheduled workshops and conferences sponsored by the Office.[382] Moreover, the scheduling for these programs has not been announced sufficiently far in advance to allow some state officials to budget necessary travel funds.

The relationship between state advisory group and state agency in those states visited appeared to be largely cordial and cooperative. Some SAGs were more deeply involved in the details of the formula grant program than others. Where a SAG has functions with regard to programs other than OJJDP's, there can, however, be a problem with ensuring that formula grant issues will receive the full attention they deserve. Relationships with other state instrumentalities which may be involved in some aspect of the formula grant program--for example the inspection of secure facilities and collection of data--can also become strained because of differences in policy priorities and changing federal interpretations.[383]

B. The Coalition

Unfortunately, the Coalition and the Office have never developed the type of relationship that Congress envisioned. While certainly the role of the Coalition as advisor on juvenile justice issues would not be served if it did not remain at some "respectful distance" from the Office, the apparent level of mutual distrust is distressingly high for a variety of reasons, some of recent origin and some not so recent. For example, the Coalition and many SAGs reflect a strong child advocacy orientation that has not welcomed Administration efforts to terminate the formula grant program.

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[382] *See* Appendix D3 at 2, which is available upon request from the Conference.

[383] *See* Appendix D3 at 4-5, which is available upon request from the Conference.

In addition to commenting on Office policies, the Coalition has served valuable functions in training state officials with regard to juvenile justice issues and serving as a clearinghouse for information through its newsletters, conferences and workshops. This may have made up to some degree for the apparent lack of effort by the Office in disseminating the results of programs that might have promise in terms of compliance with the mandates.

C. Technical Assistance Provider

According to most observers the current principal technical assistance provider, Community Research Associates, has performed well in transmitting the types of information states have needed in their compliance efforts. In fact, like the Coalition, CRA may be taking up some of the slack in the Office's dissemination function in terms of advising states with regard to successful programs elsewhere.

The quality of the assistance was generally rated highly, as was the timeliness with which it was delivered following a request to OJJDP.

Other than providing technical assistance with regard to specific identified state problems, CRA runs the workshops which are utilized by OJJDP to train and update state officials involved in the formula grant program. There are several of these each year: one or two for new state specialists which focus on basic information relevant to the administration of the formula grant program; one for all specialists which may, among other things, discuss recent developments in proposed and newly established OJJDP policies, guidelines and instructions and seek comments on those; and, finally, a workshop that focuses on monitoring for compliance with the mandates. CRA also conducts training programs to orient new members of state advisory groups to their responsibilities. The descriptions of the coverage of these programs is impressive and generally there appear to be relatively few complaints regarding their quality. However, some specialists did express concern with regard to the availability of the basic training since they had been on the job for 1 or more years before the training was made available to them.

Moreover, it is noteworthy that, in a recent training session attended by the research team, what appeared to be very basic issues regarding the formula grant program were raised by state officials. One would have expected that such matters would have been settled long ago. The ensuing confused discussion might, however, suggest that those attending the workshop and presenting the questions were new to the program or, alternatively, that even experienced juvenile justice specialists might forget the answers to the types of questions presented. This episode might suggest the need for more frequent and comprehensive training for new and experienced specialists alike in the issues of the formula grant program.

D. The Federal Coordinating Council on Juvenile Justice and Delinquency Prevention

One of the consistent concerns expressed by interviewed state officials was the lack of coordination among federal grant programs in such a way as to facilitate compliance with the JJDP Act mandates. Despite what appears to be the statutorily designated role for the Coordinating Council to provide just such coordination,[384] the efforts of the Council appear to have been minimal.[385] In view of the consistent theme of the JJDP Act[386] and its legislative history[387] that federal grant efforts in the juvenile justice area should be coordinated, it would be advisable for Congress to examine closely the role and functioning of the Coordinating Council.

E. Conclusions

In reviewing the legislative history since 1974 of the formula grant program, one is struck by the persistence of many of the types of issues and complaints which the preceding discussion has detailed with regard to OJJDP's stewardship of the formula grant program. For example, objections from some quarters that the Office focused too much on compliance issues and in a way which eliminated state flexibility were first raised in conjunction with the DSO mandate, only to be repeated recently with regard to the jail removal efforts.

Yet these complaints and charges have persisted in the face of apparent progress toward achievement of the statutory mandates. In short, the Office appears to have enjoyed some success in fulfilling the statutory goals despite the lack of strong Presidential support over most of its existence, despite the rather modest amounts of appropriated funds available to it, and despite the administrative problems which have plagued it over the years. It bears repeating that such success has been due in no small measure to a relatively small group of committed federal and state career employees, private interest groups, and individuals who have utilized the leverage afforded by scarce federal dollars and the perceived "rightness" of the mandates themselves in the effort to carry out the JJDP Act.

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[384] 42 U.S.C. §5616.

[385] *See also* H.R. Rep. No. 96-946, 96th Cong., 2d Sess. at 20 (1980).

[386] *See, e.g.,*, 42 U.S.C. §5602(b), §5614.

[387] *See, e.g.,*, S. Rep. No. 95-165, 95th Cong., 1st Sess. at 40, 45-46 (1977).

The emphasis on compliance with the mandates has not, however, gone without a variety of criticisms (aside from those which question the mandates themselves). For example, as the telephone survey[388] along with our interviews with state officials indicated, some states believe that delinquency prevention programs have been neglected as have problems of violence, sex and drug offenders and conditions of confinement. Aside from this, some of the side effects of the mandates have been a cause for concern, including an alleged increased prevalence of waiving minors to adult courts to escape the constraints of the jail removal mandate and of charging juveniles with more serious crimes to avoid the DSO mandate.[389]

At the same time, according to a number of state specialists, the beneficial side effects of the program have included increased awareness of the special needs of youth among a variety of different agencies in various states as well as greater cooperation among the agencies within the same state having some jurisdiction to deal with youth and crime-related issues.[390]

V. The Juvenile Justice and Delinquency Prevention Act Re-Authorization Act: A Postscript

On October 7, 1992, several months following completion of the foregoing study of the operation of the JJDP formula grant program, the Senate concurred with the House of Representatives in various amendments to the Juvenile Justice and Delinquency Prevention Act of 1974. Those amendments (The Juvenile Justice and Delinquency Prevention Act Re-Authorization Act, H.R. 5194)[391] were presented to President Bush, who signed them into law. In fact, they significantly transform the substantive features of the formula grant program. While the procedural recommendations flowing from our study are not affected by the those amendments, a brief description of them here is necessary for completeness of presentation. That description will indicate the persistence of some of the same mechanisms previously employed by Congress to help bring states into compliance with the statutory mandates. More importantly, it demonstrates continuing experimentation by Congress in adopting new strategies to achieve that same general purpose.

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[388] See Appendix D3 at 4-5, which is available upon request from the Conference.

[389] *Id.* at 5.

[390] Some, however, noted a greater degree of inter-agency conflict. *Id.* at 4-5.

[391] 138 Cong. Rec. (daily ed.), October 7, 1992 at S 17260-78.

First, Congress has created new "challenge" and "incentive" grant programs tied to compliance with the JJDP statutory mandates. Under a new Part E of Title II ("State Challenge Activities"), the Administrator of OJJDP may make grants to a state receiving an allocation under the formula program in the amount of 10 percent of the allocation to support the development and implementation of various policies and services, including the provision of basic health and education services for youth in the juvenile justice system, access to legal counsel, increasing community-alternatives to incarceration, removal of status offenders from the jurisdiction of the juvenile court, and increasing aftercare services for juveniles.[392] There can be cumulative 10 percent enhancements to the extent a state participates in more than one of the ten listed "challenge activities."

Under new Title V ("Incentive Grants for Local Delinquency Prevention Programs"), the Administrator may make grants to a state, to be transmitted though the state advisory group to units of local government, for delinquency prevention programs and activities for youth who have had contact with the juvenile justice system or are likely to have such contact. Such services may include recreation, tutoring and remedial education, child and adolescent health and mental health services, and alcohol and substance abuse prevention.[393] As in the case of "incentive" grants, one of the conditions for receipt of federal money under this program is compliance by the recipient unit with the statutory mandates of the JJDP Act. A 50 percent state or local match of funds is required for the incentive grant program, but no match is required to participate in the challenge grant program. The promise of additional funds for juvenile justice and delinquency prevention activities above and beyond the formula allotments may in fact provide the needed impetus to state efforts to comply with those mandates.

Turning to the mandates themselves, Congress reformulated those in various important ways. First of all, it has amended the DSO mandate to encompass "alien juveniles in custody" within its protection.[394] It also limited the "valid court order" exception to DSO by requiring that a public agency (other than a court or law enforcement agency) have determined, prior to the entry of a placement order, that placement in a secure facility is the only appropriate alternative for violation of the court order.[395]

With regard to the separation mandate, henceforth apparently no contact at all is permissible between juveniles and adults detained or confined in the same institution.[396] Previously some contact, as long as not "regular," was allowable. In addition, the mandate is enlarged to forbid contact between juveniles and part-time or full-time security staff or direct-care staff of a jail or lockup for adults.[397] The latter amendment was obviously inserted to overturn the Office's "clarification" of its "separateness" regulation implementing the jail removal mandate.

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[392] *Id.* at S 17267 (adding Part E to Title II, §235).

[393] *Id.* at S 17273 (adding Title V, §§501-506).

[394] *Id.* at S 17263.

[395] *Id.* at S 17261.

On jail removal itself, Congress has extended the nonMSA exception through 1997.[398] In addition, it has added two types of situations where detention of accused nonstatus offender juveniles in adult jails and lockups may be extended beyond the 6-hour holding period permitted under existing law. One encompasses areas where conditions of distance to be traveled or lack of highway, road, or other ground transportation (e.g., Alaska) do not allow for court appearances within 24 hours. The other includes areas where conditions of safety exist (such as severely adverse weather).[399] Finally, Congress seems to have rejected the Office's definition of a jail or lockup for adults as including only "short-term" facilities. It does so in its new definition of those terms as referring to "a locked facility that is used . . . to detain or confine adults--(i) pending the filing of a charge of violating a criminal law; (ii) awaiting trial on a criminal charge; or (iii) convicted of violating a criminal law."[400] It is not clear now what the separation mandate adds to the jail removal mandate.

Finally, Congress has seemingly added another substantive mandate by conditioning receipt of formula funds on a state's "address[ing] efforts to reduce the proportion of juveniles detained or confined in secure detention facilities, secure correctional facilities, jails, and lockups who are members of minority groups if such proportion exceeds the proportion such groups represent in the general population."[401] It remains to be seen what this "mandate" means in terms of its demands for concrete state action.

With regard to extension mechanisms applicable to mandate compliance, jail removal waiver will be a thing of the past for fiscal years after 1993.[402] However, the sanction for noncompliance with the DSO, separation, jail removal, and minority over-representation mandates may not in all cases be a total loss of formula money. Rather for each mandate unattained, a state allotment will be reduced by one quarter. However, the remainder of the allotment will also be lost unless (1) the state agrees to use all (with minor exceptions) of its formula funds to achieve compliance with the unattained mandate(s) or (2) the Administrator determines that the state has achieved substantial compliance with respect to the unattained mandate(s) and has made an unequivocal commitment to achieving full compliance within a reasonable time.[403] The amendments do not offer any definition of "substantial compliance" in this context, thus apparently remitting to OJJDP the job of fleshing out the contours of that concept and, in the process, determining the scope of flexibility afforded the states. It bears repeating, as noted above, that the threatened loss of all or part of the formula funds plus ineligibility for incentive and challenge grants may, cumulatively, bring at least some states closer to full compliance with the jail removal mandate.

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[396] *Id.* at S 17263.

[397] *Id.*

[398] *Id.*

[399] *Id.*

[400] *Id.* at S 17261.

[401] *Id.* at S 17263. It should be noted that this requirement has been in the Act for several years. However, for the first time, the 1992 legislation has treated it as a compliance issue in the same way it has treated the other three mandates.

[402] *Id.* at S 17264.

The 1992 amendments effect a variety of other changes in the statutory implementation mechanisms for the formula grant program including the following:

> 1. specifying that the Administrator of OJJDP "shall have the same reporting relationship with the Attorney General as the directors of other offices and bureaus within the Office of Justice Programs have;"[404]
>
> 1. requiring the Administrator to prepare, revise on a continuing basis, and implement a long-term plan for all federal juvenile delinquency programs and activities, such plan to include specific goals and criteria for making grants and contracts and for conducting research and provision for coordinating the administration of all federal juvenile delinquency programs and activities;[405]
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> 3. changing the statutory membership of the Federal Coordinating Council to include, in addition to nine federal agency representatives, nine public members, three each appointed by the Speaker of the House of Representatives, the majority leader of the Senate, and the President;[406]

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[403] *Id.* at S 17263-64.

[404] *Id.* at S 17261.

[405] *Id.*

[406] *Id.*

> 4. assuring that formula money is available to pay the salary of at least one full-time staff member in each state (i.e., a juvenile justice specialist);[407] and
>
> 2. to some extent reconstituting the membership and redefining the role of state advisory groups with regard to the formula grant program.[408]

The focus on coordination of policy and activities and the provision of adequate resources at the state level reflect a variety of recommendations made as a result of this study of OJJDP's formula grant program.

VI. The OJJDP Formula Grant Program In The Context Of Other Federal Grant Programs

The original purpose of our comparative analysis was to identify how federal grant programs similar to OJJDP's state formula grant program treat administrative issues and to make recommendations that extend beyond the OJJDP program. Accordingly, the appropriate base for comparison with OJJDP are programs having as close a resemblance as possible to the features of that program.

However, the more we studied OJJDP and reviewed the federal grant universe, the more it became clear that OJJDP's formula program is unusual in terms of the administrative issues presented. This is true despite the existence of some superficial similarities to other existing programs. That distinctiveness is due largely to the nature of the three substantive mandates of the JJDP Act.

The principal conclusion that follows from this comparative effort is that congressional creation of the OJJDP formula grant program, which is designed to function in a regulatory capacity at both the federal and state levels,[409] requires a substantial commitment of money, time, and talent if success in administrative terms is to be realized.

In the sections that follow we first offer several general observations regarding federal grant programs and a typology of those programs employed to narrow the universe for the selection of possibly comparable programs. Then we explain specifically how we identified those grant programs which appeared to offer the most promise for comparative purposes. Finally, we briefly describe the four candidate programs ultimately selected and indicate why even these are different from the OJJDP formula program in ways that limit the ability to generalize in formulating recommendations going beyond that program.

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[407] *Id.* at S 17262.

[408] *Id.*

[409] See text at notes 199-200 *supra*.

A. Selecting Other Federal Grant Programs for Comparison

A federal grant involves budget authority and outlays by the federal government (1) to support state or local programs or government operations or (2) to support the provision of services to the public including direct cash grants and payments in-kind. Depending on the activity supported, subnational governments, private institutions, nonprofit organizations or private citizens may be involved as grant agents or beneficiaries. Using this definition, a 1989 catalog of federal grant programs identifies 492 programs allocating funds to states, local governments and other nongovernmental entities.[410]

A grant involves a voluntary relationship that is conditional in nature, but which allows some flexibility and discretion on the part of the grant recipient regarding how activities are carried out.[411] Broadly speaking, there are three theories that explain the use of grants as a means of addressing specific federal policy objectives:[412]

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[410] Advisory Commission on Intergovernmental Relations, *A Catalog of Federal Grant-In-Aid Programs to State and Local Governments: Grants Funded in FY 1989*, M-167, Washington D.C., October 1989.

[411] Donald Haider, "Grants as a Tool of Public Policy," in Lester M. Salamon (ed) assisted by Michael S. Lund, *Beyond Privatization: The Tools of Government Action*, The Urban Institute Press, Washington D.C., 1989, pp. 93-124.

[412] *Ibid.* P. Peterson, B. Rabe & K. Wong, When Federalism Works [Brookings Institution (1986)] describe what they see as the three-phase maturation process of redistributive federal grant programs:

> 1. The federal government is "bold in its expectations, unclear in its objectives, imprecise in its stipulations . . ."
>
> 2. The federal government intensifies its oversight with detailed regulation and clarification of federal goals. Intergovernmental confusion and conflict increase.
>
> 3. Finally "[a] new tolerance of local diversity, a new recognition that no single programmatic thrust is clearly preferable, and an appreciation of the limits as to what can be directed from the center steadily emerge."

Id. 133-47.

To a degree federal financial assistance to states in the juvenile justice area has followed this pattern: from pre1974 block grant programs; the detailed mandates of 1974 and 1980; and the

- **Political theories** argue that the national government is more representative of, accessible and responsive to various factions, interests, and minorities than individual state or local governments so that the federal government is in a preferred position to deal with particular problems that the states, individually or collectively, are unable to address because of structural, legal, resource, or political constraints.

- **Administrative theories** suggest that grants promote administrative effectiveness and efficiency by providing a vehicle for upgrading the budgeting, personnel, auditing and management functions of state and local governments while promoting efficiency by avoiding the excessive bureaucracy and inflexibility that are often associated with direct national provision of domestic services.

- **Economic theories** argue that grants promote fiscal equalization among governments and correct for spillovers and externalities thereby enabling state and local governments to provide additional services, especially where there is a special national interest.

In addition to differences in the purposes or objectives of federal grant programs, there are a variety of grant mechanisms used to transfer funds from the federal government to others--each mechanism has its own characteristics, impacts and consequences. There are three basic types of federal grants-in-aid: categorical, block and general assistance grants.

Categorical grants are used for specific, narrowly defined categories of activities. These grants can be distributed to eligible governments by legislatively mandated formulas (formula grants) or through a competitive process (project grants). Over the last 25 years, approximately two-thirds of all categorical grant programs have been of the project type--the most narrowly focused of all federal grant mechanisms.[413] The OJJDP state formula grant

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recent attempts by the Office to give more flexibility to states (e.g., the 1991 clarification of the separateness definition).

[413] Advisory Commission on Intergovernmental Relations, *A Catalog of Federal Grant In Aid Programs*, note 410 *supra*.

program is classified by the Advisory Commission on Intergovernmental Relations as a categorical formula grant program.[414]

A categorical formula grant can be open-ended or closed-ended. An open-ended categorical grant provides funds to state and local governments without specific appropriations limits on expenditures. Specifically, the federal government may distribute funds to states to support eligible recipients at a specified rate, but the exact number of eligible beneficiaries receiving benefits may not be known in advance. In contrast, a closed-ended categorical grant program has a specific amount of funds appropriated by Congress for the purposes of the program and these funds may be allocated according to a legislatively determined formula.

Merely requiring that the grant be used for a particular purpose does not assure that total local spending for that activity will rise by the amount of the assistance.[415] Categorical grants may require that the recipient match, to some degree, federal moneys. Alternatively, categorical grants may require recipients to continue to spend the same amount on the aided activity as they did before the grant program was enacted, i.e.,, federal money cannot be used to supplant local money already allocated to the aided activity. The OJJDP state formula grant program has a limited matching requirement[416] and a prohibition of using federal grant funds to supplant state and local dollars.[417]

Block grants, while sharing some of the features of categorical grants, are characterized by relatively broad program purposes. Block grants give greater flexibility to recipients to determine spending priorities and impose fewer administrative and reporting burdens on recipients and federal executive departments. The emergence of block grants on the intergovernmental landscape reflects several concerns. Most importantly, critics of categorical grant programs suggested that many categorical program requirements were so complex that they enmeshed federal administrators in administrative details that often obscured program goals and frustrated local accomplishment.[418] Block grants were perceived as a means of improving grant administration by providing more flexibility for recipients to set priorities and fewer administrative requirements for recipients and federal agencies alike.

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[414] Advisory Commission on Intergovernmental Relations, *A Catalog of Federal Grants In Aid Programs*, note 410 *supra*.

[415] Robert D. Ebel (ed.), *A Fiscal Agenda for Nevada: Revenue Options for State and Local Governments in the 1990s*, University of Nevada Press, Reno, 1990, Chapter 11.

[416] *See* 42 U.S.C. §5632(c).

[417] *See id.* §5633(a)(21).

[418] Jeffrey L. Pressman & Aaron B. Wildavsky, *Implementation*, University of California Press, Berkeley California, 1973 as cited in George Peterson et. al., *The Reagan Block Grants*, The Urban Institute, 1986, p. 3.

Finally, **general purpose assistance** provides funds to recipients which can be used for any purpose whatever, i.e.,, there are no conditions attached to the use of the funds for particular activities or services. Funds are allocated to eligible governments according to a legislatively determined distribution formula. The only example of general assistance grants-in-aid at the federal level was the general revenue sharing program which was terminated in 1986.

Table 4 presents, in a summary fashion, selected characteristics of major types of federal grants. In terms of recipient discretion the range is from categorical project grants with very limited discretion to general assistance grants with total discretion. Similarly, the range in program scope is from very narrow program scope for categorical project grants to very broad scope for general assistance grants. Finally, the funding criteria is generally a legislatively determined allocation formula, except in the case of categorical project grants which are allocated through a competitive process based on administrative evaluation criteria.

Table 4
Selected Characteristics of Major Types of Federal Grants

Type of Grant	recipient Discretion	Program Scope	Funding Criteria
Categorical Project	Very low	Narrow Program	Federal administrative review
Formula	Low	Narrow Program	Legislative formula
Block	Medium	Broad functional area	Legislative formula
General revenue sharing	High	Broad Government operations	Legislative formula

Source: Donald Haider, "Grants As A Tool of Public Policy" appearing in Lester M. Salamon, Ed. (assisted by Michael S. Lund), *Beyond Privatization: The Tools of Government Action*, Washington, D.C.: The Urban Institute Press, 1989.

The OJJDP state formula grant program emerged from an earlier block grant program created during the Nixon Administration. There was, in effect, a recategorization of the juvenile justice portion of that program into today's OJJDP grant program. This has lead some observers to characterize the OJJDP program as a hybrid between a categorical and block grant.[419] Despite this perception, however, selection of a comparison set of federal grant programs for this study focuses on categorical formula grant programs. The nature of the substantive mandates along with the detailed planning, administrative, and monitoring requirements that flow from that feature of the program make the category of closed-ended categorical grants the appropriate base for comparison. Those are the types of grant programs that likely present the types of administrative issues, including the need for an exceptions process and de minimis concepts, which were the focus of the study of the Office. In addition it appeared that particular emphasis should be placed on formula grant programs that allocate resources to state and local governments (as opposed to other recipients) and which support the delivery of social services.

Our examination of the 1989 catalog of federal grant-in-aid programs to state and local governments identified 14 block and 478 categorical grant programs. Of the 478 categorical grant programs, approximately one-third, or 155 programs, were classified as being formula rather than project grant programs. Of this subset, we identified for possible comparison with the OJJDP program 103 formula grant programs that transferred funds just to state or state and local governments. We omitted all formula grant programs that allocated funds directly to local governments or other governmental, quasi-governmental, or private entities.

Once we had narrowed our search to this general set of 103 formula grant programs, we obtained a brief description of each program from the *1990 Catalog of Federal Domestic Assistance* (CFDA).[420] Each description in the CFDA provides information on program purposes and activities for which funding may or may not be used; general policy objectives and goals; and the administrative and programmatic requirements necessary to participate in the programs listed.[421] Based on these rather brief descriptions, we excluded 29 programs because they did not provide assistance for social service-type activities. Thus, our set of possible comparison programs contained 74 categorical formula grant programs to state and local governments to support the provision of various social service-type activities.

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[419] *See* Memorandum from Charles A. Lauer, General Counsel, OGC, to Alfred S. Regnery, Acting Administrator, OJJDP, February 8, 1983.

[420] Executive Office of the President, Office of Management and Budget, *Catalog of Federal Domestic Assistance, 1990*, Washington, D.C.: Superintendent of Documents, December 1990.

[421] The CFDA contains a standard format for describing each individual grant program. However, the actual information is supplied by individual agencies responsible for administering their programs. Therefore, there is not perfect consistency across program descriptions when outlining the basic features of each program.

These 74 programs include programs from virtually every federal agency and represent a wide range of program design options. For example, approximately half of the programs require that states prepare some sort of program plan; three-quarters require states to submit an application but the remaining 25 percent are distributed automatically to all states; 1 in 5 programs has explicit maintenance of effort requirements and half of the programs have some state matching requirement; and 9 in 10 of the programs provide grant funds directly to state governments. Based on the Catalog's limited description of grants in this set of 74 programs, we tried to identify four that seemed appropriate for comparison to the OJJDP program because they appeared to have similar administrative and programmatic elements. We first identified 9 such programs. At this point, more detailed information was required to narrow the final set to four. This information was obtained by an examination of the relevant statutory provisions and agency regulations and guidelines. Based on this, we selected the final set of programs for even more detailed comparison to the OJJDP formula grant program. Brief descriptions of these programs follow.

B. The Comparison Set of Formula Grant Programs

1. Developmental Disabilities Programs: Formula Grants for Basic Support and Advocacy Protection (Office of Human Development Services, Department of Health and Human Services)[422]

In 1963, the Mental Retardation Facilities and Construction Act was enacted to promote planning activities and construction of facilities to provide services to the mentally retarded. This legislation was subsequently amended by the Developmental Disabilities Services and Facilities Construction Amendments of 1970, which constituted the first congressional effort to address the needs of a group of persons with handicaps designated as developmentally disabled. This amendment also required the creation of state planning councils to advocate, plan, monitor and evaluate services for persons with developmental disabilities.

The purpose of the program is to assist states to assure that persons with developmental disabilities receive the care, treatment and other services necessary to enable them to achieve their maximum potential through increased independence, productivity, and integration into the community. To pursue this objective, basic formula grants are made to eligible states and territories to assist them in developing and implementing state-submitted comprehensive plans to ensure that persons with developmental disabilities have the range of services available to them which best promote self-sufficiency. For FY91, $64.4 million was appropriated for this program.

2. Child Abuse and Neglect State Grants: Basic State Grants (Office of Human Development Services, Department of Health and Human Services)[423]

In each community, reports of child abuse and neglect are investigated by child protective services or the police; prevention and treatment services for both children and families are provided by public and private community agencies; and volunteer organizations and self-help groups provide assistance and support for families. The National Center for Child Abuse and Neglect (NCCAN) was established in 1974 to support and further state and local efforts in this area. NCCAN has responsibility for administering four separate grant programs. The Basic State Grant program was selected for comparison with the OJJDP state formula grant program. Under Part I of this program, NCCAN awards basic grants to state and territorial governments for assistance in developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs. For FY91, approximately $16.5 million was distributed to the 57 states and territories eligible to receive funds.

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[422] *See* 42 U.S.C. §6000 *et seq.*

[423] *See* 42 U.S.C. §§5106a-5106b.

Under Part II, NCCAN awards grants to eligible jurisdictions for the purpose of assisting states in responding to reports of medical neglect and improving the provision of services to disabled infants with life-threatening conditions and their families. For FY91, approximately $3.0 million was allocated to eligible jurisdictions under this part of the program.

3. Drug Control and Systems Improvement Grant[424] (Bureau of Justice Assistance in the Office of Justice Assistance, Department of Justice)

The growth of illicit drug use in the early 1980s raised issues of enforcement and control that challenged the existing organizational structure of American law enforcement. It was argued that the traditional approach to combating crime--almost total dependence on local efforts with little or no federal involvement--would prove inadequate for the task of controlling the sale and use of illicit drugs. These circumstances, combined with the growing public demand for a national response to the problem, led Congress to pass the Anti-Drug Abuse Act of 1986. Among other things, this Act created the Drug Control and System Improvement Formula Grant Program to provide federal assistance to state and local governments in three main areas: criminal justice, treatment, and education. Congress passed a second Anti-Drug Abuse Act in 1988 that expanded the formula grant program.

The purpose of the formula grant program today is to assist states and units of local government in carrying out specific programs that offer a high probability of improving the functioning of the criminal justice system. Special emphasis is placed on nationwide and multi-jurisdictional projects and projects that advance national drug control priorities. Funds can be allocated to state agencies and local governments for the purpose of enforcing state and local laws that establish offenses similar to offenses established in the Controlled Substances Act and to improve the functioning of the criminal justice system, with an emphasis on violent crime and serious offenders. A primary component of the formula grant program is the requirement that eligible recipients--the 50 states, the District of Columbia, and 5 territories--create a state strategy for combatting crime related to drug trafficking and abuse. Funding for this formula grant program was $423 million in FY91.

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[424] *See* 42 U.S.C. §§3750-59. The following description is taken in part from Terence Dunworth and Aaron J. Saiger, *State Strategic Planning Under the Drug Control and System Improvement Formula Grant Program*, The Rand Corporation, June 1991, pp. 1-6 and Bureau of Justice Assistance, *The Edward Byrne Memorial State and Local Law Enforcement Assistance Programs: FY 1991 Formula Grant Program Guidance and Application Kit*, Department of Justice, April 1991, pp. 1-4.

4. Assistance for Education of All Handicapped Children (Office of Special Education Programs, Department of Education)[425]

Access to free public education is generally regarded as a right of all United States citizens. However, children with disabilities have not always in fact had access to such education. The purpose of Part B of the Individuals with Disabilities Education Act is to provide funds to ensure that all handicapped children have available to them a free appropriate public education that includes special education and related services to meet their unique needs; to ensure that the rights of handicapped children and their parents are protected; to assist states and localities to provide for the education of all handicapped children; and to assess and ensure the effectiveness of efforts to educate those children.

This is accomplished through a formula grant program that allocates funds to 58 state and territorial educational agencies. State advisory committees are required as are plans to achieve the goals of full educational opportunity by dates specified in the Act and individual education programs designed for each handicapped child. For FY91 nearly $2.0 billion was appropriated.

C. A Comparison with other Federal Grant Programs

In examining the statutes and administrative regulations and guidelines relating to the four selected programs, what is most striking is the lack therein of statutory mandates of a substantive nature which require the accomplishment of specific, tangible social goals, the achievement of which can be monitored by the collection of empirical data. It is, of course, such mandates which are found in the OJJDP program and from which so much of the administrative structure and function of that formula grant program flows or is otherwise intimately related. To reiterate, those include the following:

- the existence of specific compliance deadlines;

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[425] 20 U.S.C. §§1411-20.

- the need to create standards for "substantial" and de minimis full compliance, as well as waiver, when compliance efforts have fallen short of "perfectly" full compliance with the very specific terms of the mandates by the legislatively specified dates;
- the need for elaborate monitoring systems at the state level and for federal agency oversight on a consistent basis;
- the need for specially trained state and federal employees who can interpret the monitoring data and provide necessary technical assistance; and
- the usefulness of outside technical assistance providers who can help the states achieve compliance where the Office is not able to help.

Our comparison with other programs, in large part, focuses on issues created by these features of the OJJDP formula grant program. Specifically, the comparison focuses on specific administrative features of the four programs including:

- the nature and complexity of legislative mandates;
- monitoring and reporting requirements;
- timetables for achieving specific programmatic goals;
- the role of federally mandated advocacy groups;
- federal and state staffing arrangements; and
- technical assistance.

1. Nature and Complexity of Legislative Mandates

Based on our review of the legislative and regulatory requirements of these four federal formula grant programs, the OJJDP state formula grant program is distinctive with regard to the specificity of mandates concerning the level and quality of service that must be provided by state and local governments in order to qualify to receive grant funds under this program. This conclusion was confirmed by our interviews with officials in the offices responsible for administering the comparison programs.

For example, the developmental disabilities program includes general goals and requirements for a state plan, federal priority areas of concern,[426] institutional requirements for the state system to protect and advocate the rights of persons with developmental disabilities, and individual habilitation plans with goals and methods of achieving them. However, there are no specific programmatic requirements regarding program outcomes, e.g.,, the level and quality of services to be provided to individuals.

The objective of this grant program is to develop a generic service system that will open the doors of state service programs to the developmentally disabled. This program is not designed to provide direct services, but rather to create systemic changes in planning, development and coordination within the state system so that services can be provided to persons with developmental disabilities in a strategic manner. Thus, the legislative requirements focus on administrative/procedural issues, not on program outcomes which are determined by specific state service activities.

Similarly, the child abuse and neglect state grant program has numerous requirements that relate, for example, to procedures to preserve confidentiality, promote cooperation with the police, and encourage accurate reporting. However, there are no specific requirements regarding the level and quality of services to be provided. For example, there must be a state law including provisions for reporting instances of child abuse and neglect, but the federal program allows some state flexibility with regard to the specific definitions of abuse and neglect as well as state discretion regarding who is required to report abuse and neglect (doctors, teachers, etc.) and how they are to be protected.

The drug control and systems improvement grant program probably represents the extreme in terms of the lack of specificity of programmatic requirements. Essentially, a state meets its eligibility requirement by coming in with an application on time and by designating a state agency to receive the funds. States have full discretion in determining what their needs are and how they are going to use the money to meet those needs. While the application process requires a statewide strategy, the funds can be spent in nearly two dozen programmatic areas.

In summary, the OJJDP state formula grant program has legislative mandates requiring specific quantifiable program outcomes in order to be eligible to receive funds under this program. No other federal formula grant program we examined had similar requirements addressing specific program outcomes. Virtually all other mandates deal with administrative/procedural issues.

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[426] Sixty-five percent of the funds must be spent in these areas, but there are no specific requirements pertaining to how the funds are spent–it is left to state discretion.

2. Monitoring and Reporting Requirements

The differences in the complexity and specificity of the legislative mandates discussed in the previous section has important implications for how monitoring and reporting requirements of the various programs are addressed. All the programs examined have some monitoring and reporting requirements. However, because of the nature of the legislative mandates, the OJJDP monitoring and reporting requirements are much different than the other programs examined.

To be eligible for the OJJDP state formula grant program, the state must demonstrate its compliance with the deinstitutionalization, separation and jail removal mandates. This requires extensive recordkeeping and reporting requirements. Monitoring of state data gathering and reporting systems and actual compliance with the legislative mandates is then required. Because of the need for detailed and accurate data, these data gathering, reporting and monitoring requirements are time consuming and costly for state governments to implement as well as for the federal government to monitor and evaluate. The reporting and monitoring required in the other grant programs focus on compliance with administrative and procedural mandates, rather than mandates dealing with program outcomes.

In the drug control program, for example, the major focus of the monitoring is on whether the state actually spends the money on the programs it says it is going to and whether the state complies with all the legislative requirements concerning accounting practices, matching requirements and passthroughs. These are essentially administrative and procedural issues.

In addition, the monitoring for this program may also involve visits to subgrantees who are actually providing services. The primary focus is on the reporting requirements for the subgrantees and whether they are spending the money as they are supposed to. When innovative programs are uncovered through these visits to subgrantees, they are used for cross-training and technical assistance. However, there is no effort to gather data on program participants to evaluate the level and quality of service actually being provided.

The Assistance for Education of All Handicapped Children grant program has extensive requirements, but these are fundamentally administrative and procedural in nature. The monitoring that takes place evaluates how well the state and individual school districts are complying with those requirements. The focus of such monitoring efforts is on whether each child has an Individual Education Program (IEP), whether it meets all the requirements for what needs to be in such a document, whether due process is followed in developing or challenging such a program, and whether federal monies are being misused. There is no effort to determine whether the diagnosis of the child is correct, whether the program elements in the IEP are appropriate given a specific diagnosis, or any other factors that relate to determining what an appropriate education is and how to achieve it for each child.

Unlike the other comparison programs, however, this program does require some detailed data collection and reporting. The grant allocation to each state and school district is based on the number of disabled children in the jurisdiction. Thus, schools are required to report annually on the number of children with disabilities and their geographic location. In addition, the states have to report on how many children are in various types of programs, which range from regular programs with no outside services except for some consulting specialists to institutions. They also have to report on how many children are in what types of institutions, why they are there, what the certification levels are for the personnel serving these children, and how that compares to state standards. In summary, none of the federal formula grant programs examined require the same kind or degree of data collection, reporting and monitoring as the OJJDP program.

3. Timetables for Achieving Specific Programmatic Goals

The OJJDP state formula grant program has specific legislatively determined timetables for coming into full compliance with the deinstitutionalization and jail removal mandates.

No other grant program has similar legislatively determined timetables for achieving specific program outcomes. The child abuse program has provisions for time-limited waivers of certain eligibility requirements where certain state action (generally in the form of legislation) has not been taken. In addition, with regard to the Education of Handicapped Children grant program, the timetable is for increasing participation rate (of children) to 100 percent and all states have met the deadlines. Again, the differences between programs reflect differences in the nature and complexity of the mandates and requirements of the OJJDP and the comparison programs.

4. The Role of Federally Mandated Advocacy Groups

The Juvenile Justice and Delinquency Prevention Act mandates the formation of an independent, autonomous State Advisory Group (SAG). The Developmental Disabilities Program also has a legislatively mandated state advisory council called the State Developmental Disabilities Council. The membership must be 50 percent from state agencies that serve this population and 50 percent consumers (e.g.,, disabled or families with disabled members). As with OJJDP SAGs, the primary responsibilities of the Councils are to help develop the state plan, advocate for systemic change in the state system of service delivery, and lobby as appropriate. The Councils cannot be placed in a service providing agency. They have their own budgets from the grant funds and can hire their own staff directors. The Councils get staff support from the state agencies responsible for administering this program.

There is also a National Association of Developmental Disabilities Councils (NADDC). The NADDC has an annual meeting which brings members of the Councils together to discuss common problems and receive technical training.

The Assistance for Education of All Handicapped Children grant program also mandates the creation of an independent State Advisory Committee to be appointed by the Governor. The members represent handicapped individuals, teachers, state and local education professionals and administrators of programs for handicapped people. The purpose of the State Advisory Committee is to advise the state education agency of unmet needs of the handicapped, comment publicly on the state plan, and assist the state education agency in data collection and evaluation. There is no formal national organization of State Advisory Committees.

The other formula grant programs examined here do not have formal legislative requirements to create and fund state advisory groups. With the possible exception of the Developmental Disabilities grant program, the OJJDP state formula grant program appears to have a rather unique arrangement for its legislatively mandated and grant-financed SAGs. In some cases, the SAG is responsible for making grants, monitoring performance and making state policy. In such cases, the grant funds essentially go directly to the SAG, albeit the grant is to the state agency responsible for monitoring the program.

5. Federal and State Staffing Arrangements

All of the grant programs examined here require the Governor to identify a specific state agency to be responsible for administering these programs. That state agency generally identifies one person that is primarily responsible for the administration of each program. For those programs where there is a state advisory group of some kind, this state employee usually provides staff support.

In addition, each program has a federal staff responsible for administering the program. The OJJDP program, as well as the drug control and the education for handicapped children programs, are administered by staffs in the Washington office. The developmental disabilities and child abuse programs are administered by the Washington office along with staff people in each of the 10 federal regional offices.

The Washington office staff responsible for the Education for Handicapped Children program is large (40-50 people) and relatively senior (GS grades of 13 or 14). The office is divided into two branches, one which reviews the plans and one which provides general technical support.

The staff profile for the drug control program is very similar to OJJDP. There are 4 teams, each responsible for between 13 and 16 states. The team is composed of one senior and one junior analyst.

The developmental disabilities and child abuse programs have a small Washington staff that is supported by staff in the regional offices. The regional offices provide the first review of the state plans, initial contacts for technical assistance or interpretations and are the primary contact for the state specialist. In addition to regional staff, these two programs also have Washington office staff responsible for reviewing the state plan, providing monitoring (usually in cooperation with the regional staff person) and making final decisions regarding legal interpretations, technical assistance or other policy concerns. The developmental disabilities program has a central office staff of 6 professionals. The child abuse program has a Washington office staff for this grant program of two people.

6. Technical Assistance

All the grant programs we examined have extensive technical assistance programs. However, because of the significant differences in the legislative mandates among the programs we examined, the content of in-house technical assistance to states seemed to vary substantially. For example, for virtually all of the comparison programs, the technical assistance provided directly by agency employees administering the grant program focused on interpretation of the law and providing financial guidance. This involves working with state specialists on issues of how to meet the state matching requirement, how to determine if federal funds are supplanting state funds, and how to comply with other administrative or procedural mandates.

In addition to this type of in-house technical assistance, all the programs have other means of providing technical assistance about how to meet various program objectives, i.e.,, how to provide the required services in a different, improved manner. The drug control program has a $1 million budget for technical assistance, but the money is used to help states with specific needs obtain access to technical people to address those needs, i.e.,, the money is for a brokerage role rather than the actual provision of technical assistance. On the other hand, the developmental disabilities program has technical assistance provided by the University Affiliates program, which is funded from monies other than the grant program. Similarly, the education for handicapped children program gets programmatic technical assistance from the Regional Resource Centers which, again, are funded from dollars outside the grant program. Finally, the child abuse program gets technical assistance from a variety of sources including the National Clearinghouse on Child Abuse and Neglect, the National Clearinghouse on Medical Neglect and three national resource centers. These technical assistance programs are funded from resources made available through the grant program.

In summary, technical training of federal employees and the provision of technical assistance by outside contractors may be important for the success of one or more of the four comparison programs. Relative to the OJJDP program, however, such expertise in the comparison programs does not require a focus on the day-to-day efforts of states to meet very specific federal goals. Such a focus is in fact more characteristic of a regulatory agency than a grant-making agency.

D. Conclusions

Based on our comparison with other federal grant programs, we conclude that, while the four identified programs operate under somewhat analogous procedural and substantive "mandates," these mandates do not require the same type of federal direction and oversight as that which occurs under the JJDP Act. Substantive social goals or purposes are legislatively established but they usually lack specific content. Moreover, even where they are reasonably specific (as in the case of education for handicapped children), federal oversight is directed primarily to assure compliance with applicable federal financial controls and requirements that certain laws, procedures, documentation, or policies exist. Something called "monitoring" may be required as well as reports to the federal government. But these do not require the collection and analysis of detailed empirical information indicating the state of compliance with legislatively defined substantive goals. Similarly, the technical assistance needs of the comparison programs do not have to be so narrowly focused around a set of strategies and approaches designed to achieve and maintain specific and quantifiable outcomes.

All four of these programs (like other grant mechanisms) require for their success adequate personnel and other resources. It is clear, however, that the distinctive nature of the OJJDP formula grant program creates a particularly high priority for adequate funding to cover federal and state administrative costs (including necessary training and technical assistance). This is underscored by the trends during the 1980s which saw the program mandates and requirements increase while the real value of annual appropriations for the grant program declined by over 50 percent.[427]

VII. Conclusion and Recommendations

The formula grant program administered by OJJDP raises issues that are peculiar to its regulatory nature as well as some that might arise in most, if not all, administrative settings. Some recommendations relating to such issues are rooted in statutory law and legal doctrine or in sound administrative practice generally. Others find their origin ultimately in judgments regarding what is necessary to create and administer a program that can successfully carry out congressional purposes.

Specifically, our study of the Office and its oversight of the JJDP Act formula grant program in the context of other federal formula grant programs suggests the following recommendations:

1. **Funding.** When Congress creates a federal formula grant program wherein the conditions for eligibility are similar in nature to the three substantive mandates of the JJDP Act, it should ensure that there are adequate appropriated monies available to provide staff, training, and other support necessary to enable both state and federal agencies to fulfill their respective administrative responsibilities under the program.

2. **Policymaking.**
    a. The Department of Justice should ensure that overall policy, priorities and objectives for all federal juvenile delinquency programs and activities are coordinated in order that related activities and programs advance OJJDP and state efforts to achieve and maintain compliance with the substantive mandates of the JJDP Act.
    b. The Office should so assign formula grant staff responsibilities and/or create and ensure adherence to internal operating guidelines in order that issues of policy and interpretation of general significance are identified as such as soon as feasible for possible resolution. Once such issues have been formally resolved, the Office's policy or interpretation should be made available in a timely fashion by appropriate means--whether the Federal Register or otherwise--to all state juvenile justice

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[427] Grant program appropriations were $63,750,000 and $45,750,000 in 1980 and 1989, respectively. Using the GNP implicit price deflation for government purchases of goods and services this translates into inflation adjusted (using 1982 as the base year) values of $74,561,404 and $35,603,113 in 1980 and 1989, respectively. This reflects a decline in purchasing power of 52 percent.

specialists, the National Coalition of State Juvenile Justice Advisory Groups, and other groups and entities which may have a substantial interest in the policy or interpretation.

c. In all those instances where policy or interpretation may substantially effect the interests of one or more states, the National Coalition of State Juvenile Justice Advisory Groups, or other persons and entities, the Office should engage in predecisional consultation. The mode of such predecisional consultation may appropriately take into account the scope of the impact of the policy or interpretation and other matters relevant to the efficient and effective communication of views.

d. The Office should ensure that the reasons underlying its policies and interpretations, including changes and clarifications thereof, are clearly elaborated in documents announcing such policies and interpretations.

e. The Office should have adequate internal procedures to ensure that consistent advice is afforded by state representatives to states regarding the requirements applicable to the formula grant program.

3. OJJDP Staffing.

a. The Office should have a general attorney on its staff whose primary role is to advise the OJJDP state representatives, the SRAD Director, and the Administrator with regard to broad legal matters arising in the administration of OJJDP's grant programs and to serve as a liaison with the OJP Office of General Counsel.

b. The Office should either reestablish the position of monitoring coordinator or take other equivalent steps to ensure that the evaluation of monitoring data and other information relevant to determining compliance and waiver of grant termination is even-handed and takes full account of Office policies and interpretations.

c. To the extent feasible, the Office should refrain from shifting the OJJDP state representative assignments to states on a frequent basis.

4. Background and Training of OJJDP and State Formula Grant Personnel.

a. The Office should accord due weight to prior general training or experience in the area of juvenile justice in hiring applicants for the position of state representative.

b. The Office should institute training programs specially designed for new and experienced state representatives in order that they are fully informed with regard to their roles and responsibilities; that they have adequate knowledge regarding the Office's procedures and practices for the conduct of their work; that they have a firm working knowledge of the relevant federal statutes, regulations, and guidelines applicable to the formula grant program; and that they are kept up-to-date on recent developments in Office policy regarding the formula program and recent developments in the area of juvenile justice generally that may be relevant to their roles as state representatives.

c. The Office should ensure that adequate training is provided state juvenile justice specialists for their role in the implementation of the formula grant program. This should include regularly scheduled training programs for new and experienced state juvenile justice specialists. These should be timed to ensure a) that necessary training is provided *soon* after new specialists take their positions and b) expeditious updating with regard to new developments in Office policy and interpretation, juvenile justice generally, and state compliance efforts.

5. Information Dissemination to States.

a. The Office should ensure that information collected as part of its research and program development functions which may be helpful to the states in complying with the statutory mandates is disseminated to state juvenile justice specialists in a timely fashion and accessible format.

b. The Office should create procedures to ensure that states will be a) fully consulted in a timely manner regarding applications for special emphasis grants awarded to projects in their respective jurisdictions and b) regularly informed about the progress and findings of those projects.

c. The Office should ensure that all states are kept advised in a timely fashion of promising approaches to reaching and maintaining compliance with the substantive mandates of the JJDP Act.

6. Compliance With the Statutory Mandates.

a. The Office should re-examine and ensure that its exercise of de minimis authority is consistent with the JJDP Act and applicable judicial precedent. Particular attention should be directed to its nonnumerical standards and the comparative baselines for its numerical standards.

b. The Office should ensure that state-submitted monitoring data and other information by which it determines compliance and waiver are widely available both to the states and the public generally.

c. Congress should repeal the existing provision of the JJDP Act which authorizes or requires waiver of the requirement that states submit annual monitoring reports to OJJDP. It should retain and adequately fund the current requirement that the Office periodically audit state monitoring systems to ensure their reliability.

Report for Recommendation 92-9

De Minimis Settlement Under Superfund

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

Introduction

In the last decade, following the passage in 1980 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly referred to as Superfund, our society has begun focusing its attention on the cleanup of hazardous waste sites. The task is a daunting one. There currently are approximately 1200 sites on the National Priorities List (NPL), the list of most hazardous sites, and it is likely that many more will be added to this list in the coming decades. The average cleanup cost at each of these sites is about $25 million. The aggregate cost of remedying the hazardous waste problem has been placed at several hundred billion dollars.

Liability for these cleanup costs has been imposed on a very broad set of parties--practically any party that had any connection with hazardous substances placed at a site in need of a cleanup. Defendants at typical Superfund sites include not only the large industrial firms, but a large array of small entities--local dry cleaners, hospitals, and even pizza parlors. Some parties bear a large share of the liability at a site--most often, because they generated a large proportion of the hazardous substances--but many others--both large and small firms--will have generated relatively little and be responsible for perhaps only a few thousand dollars in cleanup costs. Unfortunately, the process for apportioning the cleanup costs at a site is cumbersome and gives rise to substantial transaction costs, principally in the form of legal fees. Parties that are responsible for only a small share of the cleanup costs might have to disburse several times this amount in transaction costs.

Congress expressed concern about this scenario in 1986 when it reauthorized the program and amended the statute in substantial ways. This concern was translated into a statutory section designed to make it easier for such parties, labeled as *de minimis* parties, to enter into early settlements with EPA, thereby limiting their disbursements of transaction costs.

This study assesses the functioning of the *de minimis* settlement program, and makes recommendations for its improvement. We believe that the ultimate success of the Superfund scheme, at least in its current form, is closely linked to the effectiveness of its program for *de minimis* settlements. As the statute comes up for periodic reauthorization, next in 1994, the misallocation of social resources that would result in the absence of a well functioning program for *de minimis* settlements may well provide the impetus for a broad reconceptualization of the Nation's approach to the problem of hazardous waste remediation, and perhaps even of our commitment to this goal.[1]

This study is organized as follows. Part I provides the background necessary to understand the context in which *de minimis* settlements take place. Part II discusses the objectives that ought to guide the *de minimis* settlement program. Part III analyzes the various guidance documents concerning *de minimis* settlements issued by the Environmental Protection Agency (EPA). Part IV consists of an empirical study of the *de minimis* settlements entered through June 30, 1992. Part V discusses the interviews that we conducted with the attorneys charged with primary responsibility for *de minimis* settlements at each of EPA's regional offices and with selected representatives of private defendants in Superfund actions, both *de minimis* and non*de minimis*. Part VI recommends a number of improvements for the program.

I. The Nature of the Problem

To understand the context in which issues involving *de minimis* settlements arise, we discuss the Superfund liability scheme, the process by which hazardous waste sites are cleaned up, the transaction costs of assigning responsibility among the various defendants, and, finally, the statutory provisions governing settlements in general and *de minimis* settlements in particular.

A. The Liability Scheme

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),[2] commonly referred to as Superfund, and the Superfund Amendments and Reauthorization Act of 1986 (SARA),[3] set forth a far-reaching scheme imposing liability for the cleanup of hazardous waste sites. The liability provisions are triggered by the release or threat of release of hazardous substances into the environment. For each site at which such a release occurs, the statute defines four categories of liable parties: the generators of the hazardous substances present at the site, the transporters of these substances to the site, the current owner of the site, and prior owners during whose period of ownership there was disposal of hazardous substances at the site.[4] These parties are liable for the costs of cleanup of the site, as well as for damage to natural resources under the control of the federal or state governments, or Indian tribes.[5]

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[1] For example, a recent report presents transaction costs as one of the central criteria by which to evaluate the relative merits of different policies. *See* Katherine N. Probst & Paul R. Portney, *Assigning Liability for Superfund Cleanups: An Analysis of Policy Options* (RFF Report 1992).

[2] Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. __9601-9675).

[3] Pub. L. No. 99-499, 100 Stat. 1613 (1986).

The liability standard under the statute is strict liability, rather than negligence.[6] Moreover, the courts have fashioned a federal common law rule, informed by the Restatement (Second) of Torts,[7] holding parties jointly and severally liable if the harm at the site is indivisible.[8] Defendants held jointly and severally liable can seek contribution from other defendants.[9] The existence of joint and several liability is significant in the Superfund context because, given the significant periods of time--often several decades--between the disposal of hazardous substances and the cleanup, it is particularly likely that some liable parties will not be found, or will be insolvent. The remaining defendants will then have to bear a disproportionate amount of the costs.

The statute provides a limited set of defenses. A party can escape liability only if it can show by a preponderance of the evidence that the release or threat of release was caused solely by an act of God, an act of war, an act or omission of a third party, or a combination of these causes.[10] Not surprisingly, only the third-party defense has been of practical significance. In addition to causation by a third party, a defendant seeking to escape liability in this way must show that it took due care with respect to the hazardous substances and precautions against foreseeable acts or omissions of the third party, and that such acts or omissions did not occur in connection with a contractual relationship with the defendant.[11] Thus, for example, it is clear that a generator cannot escape liability by arguing that the problem was caused by the transporter with which it contracted for the disposal of the wastes.

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[4] 42 U.S.C. _9607(a). Under a limited set of circumstances a prior owner can be liable even if there was no disposal during its period of ownership. Liability will attach if the prior owner had actual knowledge of the release or threatened release when it owned the property, and transferred it without disclosing such knowledge. 42 U.S.C. _9607(35)(C).

[5] 42 U.S.C. _9607(a), (f)(1).

[6] 42 U.S.C. _9601(32) states that the liability standard shall be the same as under 33 U.S.C. _1321--a provision of the Clean Water Act. The courts have determined that strict liability applies to these actions. *See, e.g.*, Tanglewood East Homeowners v. Charles Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985).

[7] Restatement (Second) of Torts _433A (1965).

[8] *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160, 171 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805-10 (S.D. Ohio 1983).

[9] 42 U.S.C. _9613(f)(1).

[10] 42 U.S.C. _9607(b).

[11] 42 U.S.C. _9607(b)(3).

A more complex situation arises if the current owner of the site seeks to establish a third-party defense by maintaining that the problem was caused by a prior owner. The statute provides that the term "contractual relationship" for the purpose of the third-party defense includes instruments transferring title to land, unless the purchaser acquired the property after the disposal of the hazardous substances and did not know or had no reason to know that the hazardous substances responsible for the release or threatened release had been present at the site.[12] To establish the latter, the purchaser must show that, at the time of the acquisition of the property, it undertook "all appropriate inquiry" into the property's prior uses consistent with "good commercial or customary practice."[13] While this provision is commonly referred to as the "innocent landowner" defense, it is not, in fact, an independent mechanism for escaping liability. Instead, it is a definition of the term "contractual relationship" in the context of land transactions.

Finally, the existence of the third-party defense establishes, by implication, that causation is not an element of the plaintiff's cause of action. Instead, to escape liability, the defendant has the burden of establishing an alternative cause for the release or threatened release.

B. The Cleanup Process

To understand the context for *de minimis* settlements, it is important to review both the process of cleanup of hazardous waste sites and the allocation of responsibility for this cleanup among EPA and potentially responsible parties (PRPs), generally ones who bear a large share of the liability. For example, with respect to the first issue, one of the most compelling reasons for offering early settlements to parties who bear only a small share of the liability is the very long time that elapses between the discovery of a site and its ultimate cleanup--eliminating *de minimis* parties relatively early in this process can lead to the saving of the substantial costs that they would expend in legal representation (and perhaps, scientific and engineering consultants), while they faced potential liability.

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[12] 42 U.S.C. _9601(35)(A)(i). Of less practical importance are parallel provisions applying if the defendant is a governmental entity that acquired the property involuntarily or through the exercise of eminent domain, or if the defendant acquired the property by inheritance or bequest. 42 U.S.C. _9601(35)(A)(ii), (iii).

[13] 42 U.S.C. _9601(35)(B).

The allocation of responsibility between EPA and the major PRPs at a particular site is also of critical importance. Many of the issues raised by a *de minimis* settlement concern its effect on subsequent settlements pursuant to which the major parties agree to undertake the cleanup of the site.

1. Stages of the Cleanup Process

There are seven relevant stages in the cleanup process.[14] The early stages involve the screening of sites to determine which pose the most serious health problems, and should therefore become the focus of EPA's attention. The later stages involve the cleanup of these sites.

First, EPA must become aware of a site's existence. Generally, a site comes to the Agency's attention as a result of citizen complaints or nomination by a state. Significantly, there is no federal site discovery program. When EPA becomes aware of a site, the site is placed in EPA's CERCLA Information System (CERCLIS), an inventory of sites that potentially require cleanup. To date, over 33,000 sites have entered the CERCLIS database.

Second, EPA conducts a Preliminary Assessment (PA) and, if warranted, a Site Inspection (SI) to ascertain, in increasing level of detail, the risks posed by the site. At each of these stages, many sites are classified as sufficiently harmless to warrant no further attention.

Third, sites are then ranked under the Hazard Ranking System (HRS). The HRS is a composite score that measures the risk of the site by reference to three possible routes of human exposure: groundwater, surface water, and air.[15]

Fourth, sites that receive a score of 28.50 or higher are placed on the National Priorities List (NPL). To date, approximately 1200 sites have entered the NPL. Only sites listed on the NPL are eligible for the expenditure of money for remedial action from the Hazardous Substances Trust Fund (better known as the Superfund); this limitation does not apply to removal actions (quicker and less extensive measures often undertaken in the face of emergencies). When Congress enacted CERCLA in late 1980, it authorized the appropriation of $1.6 billion for the Superfund during the first five years of the program; an additional $8.5 billion for 1986-91 and $5.1 billion for 1991-94 were authorized in 1986 and 1991, respectively. It is important to underscore, however, that the primary means for the financing of cleanups, is the liability scheme discussed in the previous section. The Superfund serves as a residual source of funding, to pay for the cleanup of sites for which there are no solvent PRPs,[16] and, more frequently, to advance funds in other sites until EPA can obtain a settlement or a judgment against the PRPs. While some *de minimis* settlements have involved removal actions for sites not listed on the NPL, the vast majority have been entered in connection with remedial actions for NPL sites.

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[14] For discussion, see, e.g., Jan Paul Acton, *Understanding Superfund: A Progress Report* (Rand Corporation 1989); U.S. Congress, Office of Technology Assessment, *Coming Clean: Superfund's Problems Can Be Solved* (1989) [hereinafter cited as *Coming Clean*].

[15] In fact, the air subscores are frequently not calculated if the two water routes lead to a score of over 28.50. See *Coming Clean*, *supra* note 14, at 116-17.

For sites on the NPL, the fifth stage of the process involves the preparation of a Remedial Investigation/Feasibility Study (RI/FS). This stage consists of a more detailed examination of the site and a preliminary study of possible remedies.

Sixth, EPA issues a Record of Decision (ROD). This document contains an analysis of alternative remedies, with their expected costs, and selects the remedy that will be implemented at the site.

Seventh, comes the Remedial Design and Remedial Action (RD/RA). The former is a more detailed design of the remediation technique chosen in the ROD. The latter is the actual cleanup of the site.

The process, however, does not always occur in this linear fashion. Cleanup activities at a site are often divided into operable units; one unit, for example might involve soil removal and, another, groundwater treatment. The different operable units may progress at different rates: one might be at the RD/RA stage whereas the other might be at the RI/FS stage.

For the purpose of this study of *de minimis* settlements, the stages that occur after listing on the NPL are of most relevance. Except in the case of emergency removal action in nonNPL sites, it is only after listing on the NPL that it becomes clear that PRPs will have to pay for the cleanup costs at the site. An early *de minimis* settlement is therefore one that occurs after listing on the NPL but prior to the completion of the RI/FS; a late settlement occurs in the RD/RA phase.

Also relevant to an understanding of the issues raised by *de minimis* settlements is the length of time that elapses between the various stages. Obviously, the call for *de minimis* settlements during the early stages of the process is more compelling if this process is a slow one.

A Rand Corporation study completed in 1989 showed that, for a site that ultimately gets listed on the NPL, it takes on average 43 months between the time EPA becomes aware of a site's existence and its listing. Twenty months then elapse until the beginning of the RI/FS, 38 additional months until the issuance of the ROD; the RD/RA takes an additional 43 months.[17] Thus, about eight-and-a-half years elapse, on average, between the listing on the NPL and the completion of the RD/RA--a time during which most PRPs will expend transaction costs if their liability remains unresolved.

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[16] If there is at least one solvent PRP and the harm at the site is indivisible, EPA can recover the full cleanup costs as a result of the rule of joint and several liability, even if this PRP contributed only a small share of the hazardous substances. EPA may decide to contribute to such a cleanup with Superfund moneys pursuant to the mixed funding provisions of 42 U.S.C. _9622(b)(1).

2. Allocation of Cleanup Responsibilities between EPA and the PRPs

Of the post-listing stages, the RI/FS and the RD/RA can be conducted by EPA, the state in which the site is located, or a group of PRPs.[18] In contrast, the issuance of the ROD is the sole responsibility of EPA. By the end of 1990, PRPs had financed and supervised approximately 35% of RI/FSs and 45% of RD/RAs.[19]

From the perspective of the PRPs, it can be desirable to conduct the RI/FS and RD/RA activities for two principal reasons. First, they might believe that they can supervise contractors more effectively than EPA, and therefore, that the cost of a given cleanup will be lower if the PRPs have taken the lead. Second, they might believe that, by conducting the RI/FS and/or the RD/RA themselves, they will be able to persuade EPA to accept cleanups that are less extensive than those that EPA would have chosen.[20]

From EPA's perspective, PRP-led cleanups are desirable because they do not involve the expenditure of Superfund moneys, or, more accurately, the advance of such funds pending a settlement for cleanup costs or a judgment following litigation. Moreover, PRP responsibility for some sites can enable EPA to concentrate its limited managerial resources at sites in which, because of the lack of plausible alternatives, it must conduct the cleanup itself.

EPA has the statutory authority to order PRPs to perform cleanups.[21] More commonly, however, PRP-led cleanups occur as a result of settlements with

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[17] *See Coming Clean*, *supra* note 14, at 16. The RD/RA figures are based on a small number of observations, since very few sites had made it to this stage. See *id.* at 26.

[18] There has been some recent controversy over whether the PRPs can conduct RI/FSs.

[19] *See* Jan Paul Acton & Lloyd S. Dixon, *Superfund and Transaction Costs: The Experiences of Insurers and Very Large Industrial Firms* 9 (Rand Corporation 1992) [hereinafter cited as Acton and Dixon].

[20] For discussions of whether there exist differences in remedy selection when PRPs lead the cleanup, see, *e.g.*, *Coming Clean*, *supra* note 14, at 161-74; *A Comparative Analysis of Remedies Selected in the Superfund Program During FY 87, FY 88, and FY 89*, OSWER Directive #9835.13 (June 20, 1990).

[21] *See* 42 U.S.C. _9606(a).

EPA.[22] Such a course of action was forcefully advocated by a 1984 recommendation of the Administrative Conference of the United States,[23] and was specifically endorsed in the congressional reports accompanying the 1986 amendments.[24] Consistent with this direction, EPA's ultimate goal often is an agreement under which the PRPs would perform the RD/RA.[25] Moreover, as we explain below, the Regions often evaluate the desirability of *de minimis* settlements primarily on the basis of their expected effect on a settlement with the major parties pursuant to which they would undertake the cleanup.[26]

C. Transactions Costs

Perhaps the central justification for *de minimis* settlements is that they provide a way to reduce the transaction costs of parties who bear a small percentage of the liability, but for whom the cost of representation during the protracted cleanup process might nonetheless be substantial. As EPA itself noted:

> "The legal fees and other transaction costs of negotiating and litigating with the Government, compounded by the potential costs of asserting and defending claims for contribution with other PRPs at the site, often could exceed the amount such minimal contributors could be expected to pay, even under a settlement or judgment unfavorable to them."[27]

Ideally, there would be good data on the transactions costs expended by *de minimis* parties. While there have been a few empirical studies about transaction costs borne by private parties as a result of the Superfund liability scheme, none have focused explicitly on the costs imposed by the scheme on

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[22] 42 U.S.C. _9622(a) provides the statutory authority for such settlements for such settlements.

[23] *See* 1 C.F.R. _305.84-4.

[24] "Congress finds that this recommendation ... is generally consistent with the goals and purposes of ... [CERCLA] ... and that the Administrator should consider ... and implement it to the extent that the Administrator determines that such implementation will expedite the cleanup of hazardous substances which have been released into the environment." H.R. 2005, _154, *Legislative History of the Superfund Amendments and Reauthorization Act of 1986* at 1457; see S. 51, _139, *id.* at 947.

[25] For discussions of EPA's shift toward this goal, see, *e.g.*, *Tracking Superfund: Where the Program Stands* 43 (1990); *Coming Clean*, *supra* note 14, at 161-74.

[26] *See infra* IV. C. 1; V. B.

[27] OSWER Directive #9834.7, p. 2.

de minimis parties. Some of the conclusions of the more general studies are nonetheless relevant.

Most recently, the Rand Corporation completed a study of the transaction costs faced by very large industrial firms.[28] The Rand researchers asked eight firms on the Fortune 100 list of U.S. industrial companies to participate in the study; five agreed to do so.

The study defined transaction costs as costs that, unlike investigation and remediation costs, "do not contribute directly to the cleanup process; instead, they are concerned with the assignment of financial liability and legal issues."[29] Pursuant to this definition, all legal expenditures were classified as transaction costs. Engineering and nonlegal expenditures were classified as transaction costs if, for example, their purpose was to search for another PRP or contest a remedy chosen by EPA. Transaction costs were divided into internal costs (in-house lawyers and scientific staff) and external costs, which included payments to PRP committees--committees formed by the PRPs to represent them in negotiation and litigation with EPA.[30] On average, 75% of the transaction costs were for external or internal attorneys.[31]

The study found that, on average, 21% of the total outlays by a PRP were for transaction costs. It then analyzed how a firm's share of transaction costs varied across sites with different characteristics; for each firm, it considered only sites at which the firm had spent at least $100,000. Of this sample, the average share of transaction costs with each site weighted equally was 30%, whereas the dollar-weighted average was 13%; the large difference between the two averages is attributable to the fact that sites with the largest expenditures have the lowest ratio of transaction costs.[32]

There was, however, considerable variation in the share of transaction costs. Of most relevance, the share of transaction costs was inversely related to a firm's total expenditures at a site. Thus, whereas the average share across sites was 5% (4%, if dollar-weighted) for firm expenditures of over $3 million, it was 38% (39%, if dollar-weighted) for firm expenditures in the $100,000 to $500,000 range. An extrapolation would suggest that this share continues to rise as a party's share of the liability decreases.

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[28] Acton & Dixon, *supra* note 19.

[29] Acton & Dixon, *supra* note 19, at 36.

[30] Acton & Dixon, *supra* note 19, at 36-39.

[31] Acton & Dixon, *supra* note 19, at 41.

[32] Acton & Dixon, *supra* note 19, at 48. Both these percentages, and all percentages discussed below would be four percentage points higher if costs that could not be attributed to either transaction costs or investigation and remediation were added to the transaction cost figures. *Id.*

Of course, it is not possible to draw detailed conclusions from the Rand study about the share of transaction costs of *de minimis* parties. While both large and small firms may be *de minimis* parties at a particular site, the pattern of expenditures of transaction costs may be quite different.[33] On the one hand, a large firm is probably more likely to be a party at a larger number of Superfund sites; as a result of greater expertise, it may be able to respond to Superfund cases more efficiently. On the other hand, a large firm may be more concerned about the impact of a particular settlement on other cases, and may therefore be more willing to expend transaction costs. In addition, the Rand study made no attempt to calculate the share of transaction costs for firms that spent less than $100,000 at a site.

It is worth noting, however, that the term *de minimis* can encompass a very wide range of potential liability. The average cleanup cost at an NPL site is approximately $25 million. A generator that contributed 1% of the waste would, in all likelihood, qualify for *de minimis* status,[34] and would face a liability of $250,000, even without the payment of a premium, and would be within the range of transaction costs covered by the Rand study. In contrast, the share of liability of many *de minimis* parties is only a few thousand dollars, or even less. For such parties, any sort of legal representation would produce an extremely high share of transaction costs.

D. The Settlement Provisions

During the debates preceding the 1986 amendments Congress paid considerable attention to the transaction costs of the Superfund program as well as, more particularly, the transaction costs borne by parties who face only a small share of the liability. For example, in introducing the Senate amendments, Senator Domenici expressed general concern with the transaction costs generated by litigating Superfund liability. He explained the desirability of encouraging the government to settle "with small contributors without full-blown litigation."[35] Senators Bentsen and Simpson echoed this language, with Senator Bentsen adding that small contributors would be able to pay "their appropriate share and then they would be removed from the litigation."[36]

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[33] The Rand Corporation is currently embarked on a study of transaction costs borne by mid-size and small companies at Superfund sites.

[34] *See infra* Section IV. C. 1.

[35] *A Legislative History of the Superfund Amendments and Reauthorization Act of 1986* at 1241.

[36] *Id.* at 1242.

Along similar lines, Representative [now Senator] Hank Brown expressed concern with the impact of Superfund on small business *de minimis* contributors--"grocery stores, body shops, paint stores, car washes, colleges and universities." He found that, though these entities were said to be responsible for only 0.3% of the hazardous wastes generated, the threat of joint and several liability was enough to scare off potential lenders and insurers: "The impact of this ripples through the economy as small business finds itself unable to borrow needed capital for expansion and investment due to the contingent liabilities generated under the CERCLA liability system."[37]

Congress translated these concerns into statutory provisions seeking to encourage settlements in general--section 122[38]--and *de minimis* settlements in particular--section 122(g)[39]. The latter section provides that "whenever practicable and in the public interest," the Administrator "shall as promptly as possible reach a final settlement with a potentially responsible party ... if such settlement involves only a minor portion of the response costs at the facility."[40] The following additional conditions must be met. Generators and transporters can qualify for *de minimis* settlements if the amount of the hazardous substances contributed and the hazardous effects of these substances are both minimal in comparison to other hazardous substances at the facility.[41]

In turn, landowners can qualify for *de minimis* status if they "did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility"[42] and "did not contribute to the release or threat of release of a hazardous substance at the facility through any act or omission."[43] In addition, the party must not have purchased the property "with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substances."[44]

De minimis settlements have several important features. First, the Administrator may provide a party to such a settlement with a covenant not to sue, unless such a covenant would be inconsistent with the public interest.[45]

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[37] *Id.* at 2273.

[38] 42 U.S.C. _9622.

[39] 42 U.S.C. _9622(g).

[40] 42 U.S.C. _9622(g)(1). The statute places this responsibility on the President, who has delegated this authority to the EPA Administrator.

[41] 42 U.S.C. _9622(g)(1)(A).

[42] 42 U.S.C. _9622(g)(1)(B)(ii).

[43] 42 U.S.C. _9622(g)(1)(B)(iii).

[44] 42 U.S.C. _9622(g)(1)(B).

[45] 42 U.S.C. _9622(g)(2). The one exception concerns covenants not to sue for natural resources damages, which are governed by a different provision. See 42 U.S.C. _9622(j).

The Administrator is directed to grant such a covenant as soon as possible after he has the information necessary to engage in such an action.[46] Second, a *de minimis* settlement can be embodied either in a consent decree or administrative order. The latter must be approved by the Attorney General if they involve sites for which the cleanup costs are over $500,000.[47] Third, a party to a *de minimis* settlement shall not be liable for contribution to other defendants.[48]

Finally, the statute provides that EPA's claim against nonsettling defendants shall be reduced by the amount of the settlement,[49] a pro tanto set-off modeled after the Uniform Contribution Among Tortfeasors Act.[50] Thus, if EPA settles with some defendants for less than their proportional share, the remaining defendants will bear more than their proportional share.[51]

As indicated above, the procedures for *de minimis* settlement are part of a more general set of settlement provisions that apply to non*de minimis* parties as well. They differ, however, in several important ways. First, only in the case of *de minimis* parties does the statute appear to constrain, albeit not completely, the discretion of the Administrator to determine whether to settle a claim. Whereas in non*de minimis* cases, the statute states that the Administrator "may" compromise or settle a claim,[52] for *de minimis* parties, he "shall" do so; this obligation is qualified only by the "[w]henever practicable and in the public interest" clause.

Second, there is a greater sense of immediacy for *de minimis* settlements. One subsection states that such settlements shall be entered into "as promptly as possible;"[53] another provides that such a *de minimis* claim be settled, and a covenant not to sue extended "as soon as possible" after the Administrator has the necessary information.[54] None of the other settlement provisions set forth such a time frame.[55]

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[46] 42 U.S.C. _9622(g)(3).

[47] 42 U.S.C. _9622(g)(4).

[48] 42 U.S.C. _9622(g)(5).

[49] 42 U.S.C. _9622(g)(5).

[50] *Unif. Contribution Among Tortfeasors Act* _4(a), 12 U.L.A. 98 (1955). For an economic analysis of this set-off rule, see Lewis A. Kornhauser & Richard L. Revesz, *Multi-Defendant Settlements: The Impact of Joint and Several Liability* (manuscript under submission). For a comparison of alternative set-off rules, see Lewis A. Kornhauser & Richard L. Revesz, *Multi-Defendant Settlements: The Choice Among Set-Off Rules* (manuscript).

[51] An alternative set-off rule, embodied in the Uniform Comparative Fault Act would reduce the plaintiff's claim against nonsettling defendants by the settling defendant's proportional share of liability. *Unif. Comparative Fault Act* _6, 12 U.L.A. 56 (Supp. 1991). Under this rule, if the plaintiff settles for too little it will not be able recover the shortfall from the nonsettling defendants. See Kornhauser & Revesz, *supra* note 50, at pp. 9-16.

[52] 42 U.S.C. _9622(a), (h)(1).

[53] 42 U.S.C. _9622(g)(1).

Third, and most importantly, it is far easier for *de minimis* defendants to obtain a covenant not to sue. The statute authorizes the Administrator to grant a settling *de minimis* defendant protection from further suit except where such an action would be "inconsistent with the public interest."[56] In contrast, in the case of non*de minimis* defendants, the Administrator must make the more exacting finding that a covenant not to sue "is in the public interest," and must make, in addition, other findings, including that the covenant not to sue would expedite the cleanup.[57]

II. Objectives of De Minimis Settlements

To be able to assess EPA's administration of the *de minimis* settlement program, it is necessary to establish, as a benchmark, the contours of a desirable program that is consistent with the statutory directive. We therefore proceed by setting forth several governing principles.

A. Deriving Some General Principles

1. Characterizing EPA's Role

First, one must distinguish between two plausible characterizations of EPA's role under Superfund. On the one hand, it is the government agency charged with improving social welfare by responding to serious threats to health and the environment. On the other hand, it is the plaintiff in individual Superfund actions: it is natural that, like plaintiffs generally, it would attempt to maximize its recovery net of the transaction costs that it must expend, or, in the event of a settlement, maximize the scope of the cleanup that the major parties agree to perform.

"EPA as plaintiff" would be indifferent to the transaction costs expended by the PRPs--it would be concerned only with its own transaction costs. Thus, for example, it might concentrate solely on reaching a settlement pursuant to which the major parties perform a cleanup, without paying any attention to the transaction costs that *de minimis* would have to bear in the interim.

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[54] 42 U.S.C. _9622(g)(3).

[55] *See* 42 U.S.C. _9622(a), (g).

[56] 42 U.S.C. _9622(g)(2).

[57] 42 U.S.C. _9622(f)(1).

In fact, under this characterization, EPA might direct the *de minimis* parties to deal directly with the major parties. Because the major parties would naturally focus on their individual interests and not on the social interest, the latter scenario is guaranteed to ensure that the final outcome will not be one that has, as one objective, the minimization of transaction costs borne by the *de minimis* parties.

"EPA as promoter of social welfare" would follow a different decision process. It would first rank scenarios on the basis of its own transaction costs or the extent of the cleanup. Next, from the scenarios ranked most highly, it would choose that one which minimizes the transaction costs borne by the PRPs in general, and *de minimis* PRPs in particular. More importantly, however, EPA should be willing to accept an outcome under which it expends higher transaction costs, or accepts a somewhat less extensive cleanup, if doing so sufficiently lowers the transaction costs imposed on PRPs. We stress that we are merely setting forth a general principle, not determining how this trade off should be conducted in an individual case.

We need not address the question of whether it ever is appropriate for a government agency to be indifferent to the transaction costs that it imposes upon its opponents in litigation. Here, Congress explicitly focused on this issue, enacted a statutory section directed exclusively to this problem, and indicated, in no uncertain terms, the importance of the objective of minimizing the transaction costs of *de minimis* parties.[58]

2. Ensuring Fairness

The second question concerns the fairness of settlements to the various PRPs. If EPA sought to take full advantage of the existence of a rule of joint and several liability in the case of indivisible harms, it might choose to litigate only against a small group of large parties. It could leave to these PRPs the task (and related transaction costs) of filing third-party actions against smaller PRPs and might then seek to have the third-party actions severed and stayed until the conclusion of its case against the major parties--a technique that EPA used occasionally in the past.

Or, in a more extreme fashion, EPA could grant the smaller parties contribution protection very early in the process in return for a nominal settlement and remove even the irritant of having to argue in favor of staying third-party actions. As long as a solvent nonsettling party remained, EPA could recover its full outlays, since under the *pro tanto* set-off rule its claim against the nonsettling parties would be reduced only by the amount of the settlement. By embodying such settlements in administrative orders on consent rather than consent decrees, EPA might even make them largely immune to judicial review.

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[58] There is a sense in which the two characterizations of EPA are not that far apart. The Superfund program depends on continued political support, particularly given Congress' decision to require relatively frequent reauthorizations. To the extent that EPA is indifferent to the impact of the scheme on PRPs, it will contribute to strengthening of public opposition to the program--presumably an outcome that EPA would not favor in its self-interested role.

There is a tradeoff between being fair to the major parties and reducing the transaction costs of the *de minimis* parties. The former objective calls for requiring the *de minimis* parties to pay their apportioned share of the cleanup costs, whereas the latter would seek to eliminate them from the litigation as early as possible regardless of what they pay. Of course, to the extent that it takes time to determine the amount of a fair share--under EPA's approach the fair share is generally the proportion of hazardous substances contributed to the site--fairness will be bought at the price of greater transaction costs.

The issue of fairness arises in a stark manner because of the combination of three legal rules: joint and several liability, *pro tanto* set-off, and contribution protection. These rules permit EPA to settle with one party, give it contribution protection even if the amount of the settlement is inadequate, and nonetheless be able to recover fully from other parties.

EPA's general approach under CERCLA has been to take advantage of the benefits of joint and several liability. For example, it consistently requires solvent parties to pay for the share of insolvent ones. At the same time, however, it has sought to mitigate the potential unfairness of joint and several liability. For example, as we show in an article that provides a detailed theoretical analysis of the liability and settlement rules under Superfund, a plaintiff facing multiple defendants can generally maximize its recovery from settlements by making the party responsible for the smaller share of the liability pay a disproportionately large amount.[59] EPA has not sought to exploit this possibility. Instead, among solvent parties, it has consistently apportioned responsibility based on volumetric contributions.[60]

We believe that EPA's concern with fairness--albeit fairness consistent with taking full advantage of joint and several liability--has been the product, at least in part, of congressional unease about the potentially harsh effects of joint and several liability. Indeed, at the time of the consideration of the 1986 amendments, EPA made representations to Congress that it would try to minimize the inequities of the liability scheme.[61] A different approach might well generate sufficient pressure to produce a congressional curtailment of joint and several liability.

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[59] Lewis A. Kornhauser & Richard L. Revesz, *Multi-Defendant Settlements: The Impact of Joint and Several Liability*, *supra* note 50.

[60] As we explain above, we do not regard the premiums that *de minimis* parties pay in return for finality even in the event of cost overruns to be a departure from this principle.

At the time of the 1986 amendments, Congress was certainly aware of EPA's proportional apportionment practice. We do not think that anything in the *de minimis* settlement provisions reveals a congressional intent that EPA depart from this approach. Neither are there compelling policy arguments for *de minimis* parties to pay less than their rightful share of the cleanup costs.

3. Ex Ante v. Ex Post Fairness

An allocation can be fair in either an *ex ante* or *ex post* sense. Assuming that the fair allocation is by reference to the proportion of hazardous waste contributed by each PRP, an *ex post* fair allocation would divide the actual cleanup costs by reference to the actual proportions of contributed wastes.

In contrast, an *ex ante* fair allocation is one that, at the time of the settlement, divides the expected cleanup costs by reference to the estimates of the proportions of contributed wastes. Of course, it might eventually turn out that the actual cleanup costs are different--either higher or lower. Similarly, additional information about the volumetric contributions of the various parties might well reveal that the earlier estimates were incorrect. Neither development, however, would detract from the fairness of the allocation, if fairness is considered in an *ex ante* sense.

One might believe that early estimates will generally be too low. A systematic bias of this sort, if one exists, can be eliminated by adding to the shares of a *de minimis* parties a premium to eliminate this bias. In fact, the EPA guidance documents on *de minimis* settlements--analyzed in Part III--already call for such premiums.[62]

It is clear that the congressional concerns over transaction costs at the time of the 1986 amendments point strongly toward an *ex ante* view of fairness in the case of *de minimis* parties. Otherwise, these parties would continue expending transaction costs until the cleanup costs and the respective waste contributions could be reliably established.

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[61] For industry complaints about joint and several liability, see, *e.g.*, *Superfund Reauthorization: Judicial and Legal Issues*, Oversight Hearings Before the Subcommittee on Administrative Law and Government Relations, Committee on the Judiciary, House of Representatives, 99th Cong., 1st Sess., July 17-18, 1985, at 953-54 (statement of Edmund Frost on behalf of the Chemical Manufacturer's Ass'n.). For the Administration's assurances, see, *e.g.*, *id.* at 14-15 (statement of Lee Thomas, Administrator of EPA), *id.* at 44-46 (statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division).

[62] *See infra* Part III.A.1.f.; III.A.2.c.

We recognize that, at some sufficiently early stage in the cleanup process, expected costs and volumetric shares will be so speculative that any allocation will be little more than arbitrary. Assume that EPA enters into *de minimis* settlements at various stages of the cleanup process, with the parties paying their *ex ante* shares. At the completion of the process, it calculates what the respective *ex post* shares would have been. Presumably, the divergence between the *ex ante* and *ex post* shares will be smaller for settlements entered into at later stages of the cleanup process.

The earliest point at which the divergence can be deemed "acceptable"--for example, the mid-point of a RI/FS--is the appropriate time to enter into a *de minimis* settlement. One would expect that, as EPA acquires more information about cleanup costs, for any given stage, the divergence will decrease over time. We do not purport to provide a mechanism for determining what an acceptable divergence might be, but think, nonetheless, that the approach set forth provides a useful metric for evaluating settlements.

4. Relationship Between De Minimis Settlements and the Liability of the Remaining Parties

Fairness in this context has a dual requirement. Not only must the *de minimis* parties pay a sufficient share of the cleanup costs, but the non*de minimis* party must get the appropriate benefit from the *de minimis* settlement. Under an *ex ante* view of fairness, there, indeed, is a close connection between the payments made by *de minimis* parties and the liability of non*de minimis* parties.

In the simplest example, some time after a *de minimis* settlement, EPA enters into a settlement with all of the remaining parties, pursuant to which these PRPs perform the cleanup. It is clear that if the cleanup costs exceed the predictions at the time of the *de minimis* settlement, even after taking the premium into account, the non*de minimis* parties will have borne a disproportionate amount of the cleanup costs. Note, however, that this scenario does not detract from the *ex ante* fairness of the *de minimis* settlement.

If, in contrast, the cleanup ends up costing less than the predictions, then fairness suggests that the major parties, rather than EPA, should get the benefit of the *ex post* surplus produced by the *de minimis* settlement. In other words, the parties that would have borne the responsibility for the any shortfall should also get the benefit of a surplus.

Consider, next, a somewhat harder example. Here, following the *de minimis* settlement, EPA performs the cleanup and then settles its cost recovery claim with the major parties. Once again, if the cleanup costs per unit of waste dumped are lower than those reflected in the *de minimis* settlement (including the premium), then fairness once again suggests that the major parties should get the benefit of this surplus.

5. Structuring De Minimis Settlements

In every system of dispute resolution, there is a tradeoff between the accuracy of a result and the cost necessary to produce that result. Similarly, in law, as in industry, tailor-made products tend to be more expensive than mass-produced ones.

Given the statutory mandate, *de minimis* settlements should be mass-produced and should sacrifice accuracy for economy to a greater extent than other resolutions of legal disputes. There is strong reason to believe--and both Congress and EPA seem to[63]--that the ratio of transaction costs to share of liability is disproportionately high for *de minimis* parties. Indeed, it is because of this disproportionate ratio that the legal regime allows *de minimis* parties to benefit from a somewhat different set of settlement rules.[64]

Both EPA and the *de minimis* parties have as a primary interest an early resolution, reasonably free of large transaction costs, of those parties' responsibility. EPA should therefore make efforts to standardize the terms of settlements. As we show below in Part IV.C, there currently is great variability in the types of reopener provisions included in *de minimis* settlements. If, as a result of the adoption of standard provisions, *de minimis* parties know that they will be unsucessful in obtaining a narrower set of reopeners, they will not expend the transaction costs to try. The same applies to non*de minimis* parties, which might be interested in seeking broader reopeners for the *de minimis* settlement.

Of course, each settlement will include site-specific terms, such as volumetric contributions, cleanup costs, and premiums. As to these, there might be disagreements among EPA, the *de minimis* parties, and the non*de minimis* parties. EPA can reduce the conflict by adopting a standardized process for determining each of these variables. For example, based on experience, EPA could adopt presumptively applicable premiums for each stage of the cleanup process; these would be used in the absence of compelling site-specific information to the contrary.

In any event, the courts have been appropriately deferential to EPA's choice of settlement terms. As the First Circuit stated, EPA's "chosen measure of comparative fault should be upheld unless it is arbitrary, capricious, and devoid of a rational basis."[65] Thus, if EPA adopts standardized procedures for determining the site-specific variables, it will almost certainly be immune from successful legal challenge.

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[63] *See supra* Part I.C; I.D.

[64] *See supra* Part I.D.

B. Summarizing the Principles

The preceding section allows us to set forth five principles to guide the design of a *de minimis* settlement policy. Following the discussion of our empirical work, we will return to these principles and use them to generate a set of recommendations concerning EPA's policy.

Principle I: EPA should consider one of its objectives to be the minimization of transaction costs that the Superfund program imposes on PRPs in general, and on *de minimis* PRPs in particular.

Principle II: Consistent with its general efforts to minimize the potentially unfair effects of joint and several liability, EPA should settle with *de minimis* parties only in return for their share of the liability.

Principle III: The fairness of *de minimis* settlements should be determined *ex ante*, rather than *ex post*.

Principle IV: The parties that would have borne the responsibility for any shortfall resulting from a *de minimis* settlement should also get the benefit of any surplus.

Principle V: There should be little bargaining over the terms of *de minimis* settlements.

III. EPA Guidance Documents on De Minimis Settlements

EPA has issued four guidance documents directed at *de minimis* settlements: three concerning waste contributors (generators and transporters) and one concerning landowners.[66]

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[65] United States v. Cannons Engineering Corp., 899 F.2d 79, 87 (1st Cir. 1990); see, *e.g.*, United States v. Rohm & Haas Co., 721 F.Supp. 666, 681 (D.N.J. 1989); *In re* Acushnet River & New Bedford Harbor, 712 F.Supp. 1019, 1031 (D.Mass. 1989).

[66] For a discussion of these policies aimed at practitioners, see Information Network for Superfund Settlements, *Issue Analysis on De Minimis Superfund Settlements* (April 1992).

A. Waste Contributor Settlements

EPA has issued guidance to its regional offices on *de minimis* waste contributor settlements in 1987 (Interim Guidance on Settlements with *De Minimis* Waste Contributors under Section 122(g) of SARA[67]), 1989 (Methodologies for Implementation of CERCLA Section 122(g)(1)(A) *De Minimis* Waste Contributor Settlements[68]), and 1992 (Methodology for Early *De Minimis* Waste Contributor Settlements under CERCLA Section 122(g)(1)(A)[69]). In addition, EPA has issued a model consent decree and administrative order.[70] While each subsequent guidance document purports to supplement the prior one,[71] as we explain below, we discern a change in policy between the second and third. We thus discuss the first and second guidance documents together, as setting forth EPA's original approach, and then discuss the third as opening the way for a potentially new approach.

1. The Original Approach

For analytical clarity, and for easy comparison between EPA's original approach and its revised policy, we divided our discussion into seven categories: public interest determination, *de minimis* status, timing of the settlements, strategies for negotiation, apportionment of costs, reopeners and premiums, use of *de minimis* moneys, and settlement documents.

a. Determination of the Public Interest

Section 122(g) requires that EPA make the threshold determination that a *de minimis* settlement would be "practicable and in the public interest."[72] The guidance documents set forth several criteria. A *de minimis* settlement would not be desirable if the distribution of wastes contributed at a site were such that every party at a site qualified for *de minimis* treatment. In such a case, a settlement "would not serve one of the primary goals of Section 122(g): elimination of certain minor parties early in the process to focus the remaining case on the major parties."[73] A *de minimis* settlement would also be inappropriate if several major parties at the site are bankrupt or otherwise nonviable.[74] More generally, the "public interest" determination should involve an evaluation of the strength of EPA's case against the viable non*de minimis* parties.[75] Thus, EPA is not willing to give up the major benefit that accrues to it as a result of joint and several liability: the ability to recover the full cleanup costs from solvent parties, even where some parties--perhaps even the major contributors are insolvent.

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[67] OSWER Directive #9834.7, 52 Fed. Reg. 24,333 (1987).

[68] OSWER Directive #9834.7-1B.

[69] OSWER Directive #9834.7-1C, 57 Fed. Reg. 29,312 (1992).

[70] Interim Model CERCLA Section 122(g)(4) *De Minimis Waste Contributor Consent Decree and Administrative Order on Consent*, OSWER Directive #9834.7-1A, 52 Fed. Reg. 43,393 (1987).

[71] *See, e.g.*, OSWER Directive #9834.7-1B, p. 1, n.1; OSWER Directive #9834.7-1C, p. 1.

[72] 42 U.S.C. _ 9622(g)(1).

[73] OSWER Directive #9834.1, p. 9.

The "public interest" inquiry also involves an assessment of the government's interest in settling with *de minimis* parties.[76] The following interests are listed:

1. To resolve the liability of *de minimis* parties for all past and future response activities at a site;
2. To do so relatively early in the process to reduce the transaction costs of both the *de minimis* parties and the government;
3. To obtain money to replenish the Superfund with a relatively modest effort on the part of the government; and
4. To provide an incentive for non*de minimis* parties to settle simultaneously by reducing, by the amount of the settlement, the government's claim against them.[77]

EPA thus includes among its objectives not only its interest, as a party to litigation, to minimize the transaction costs necessary to recover the cleanup costs, but also a broader interest, as a governmental actor seeking to increase social welfare, to minimize the transaction costs of at least some of its opponents.

b. De Minimis Status

Section 122(g) refers to three requirements for *de minimis* status: that the volume and toxicity of the hazardous substances contributed by a *de minimis* party be minimal in comparison to the other hazardous substances at the facility, and the settlement must involve only a minor portion of the response costs at the facility. With respect to the requirement that the volume contributed by a *de minimis* party be minimal, the guidance documents do no more than restate the statutory standard, and indicate that *de minimis* status must be determined on a site specific basis.[78] By 1989, EPA had used cutofffs ranging from 0.2% to 2% of the total waste at the site.[79]

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[74] OSWER Directive #9834.7, p. 9.

[75] OSWER Directive #9834.7-1B, p. 3.

[76] OSWER Directive #9834.7-1B, p. 3.

[77] OSWER Directive #9834.7-1B, p. 2; *see* OSWER Directive #9834.7, pp. 4-5. This document indicates that non*de minimis* parties can also benefit from a settlement:

1. They may not be burdened with third-party suits for contribution against settling *de minimis* parties;
2. Their transaction costs may be reduced; and
3. The *de minimis* settlement might provide start-up funds to finance a cleanup. *Id.* at 3.

As to toxicity, the guidance documents recharacterize the statutory requirement as being satisfied if the hazardous substances contributed "are not significantly more toxic and not of significantly greater hazardous effect than other substances at the facility."[80] Recommended as an alternative approach is an inquiry of the remedial costs of the contributed waste. Thus, for example, a PRP would not qualify for *de minimis* status if it disposed a substance requiring a different or more costly remedial technique than the one that would otherwise be chosen for the site.[81]

The requirement that a *de minimis* settlement involve only a minor portion of the response costs, applies by its terms, as EPA itself recognizes,[82] to the settlement with each *de minimis* party, not to the total amount recovered in a settlement involving several *de minimis* parties.[83] It is possible, for example, that in cases in which the major waste contributors cannot be identified or are insolvent, a defendant that met the minimal volume and toxicity requirements of section 122(g) would nonetheless have to bear a large portion of the cleanup costs; such a defendant would not qualify for *de minimis* status.

The guidance documents do not interpret the statutory requirement. They state, however, that, as a matter of policy, EPA considers the collective *de minimis* parties' settlement payment, and that, by 1989, collective payments had ranged up to 33% of the response costs at the site.[84] Apparently, EPA will not enter into a *de minimis* settlement that resolves too large a proportion of the liability at the site. This nonstatutory requirement can be seen as a proxy for ensuring that parties responsible for a sufficiently large proportion of the liability remain in the case until the later stages of the cleanup.[85]

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[78] OSWER Directive #9834.7, pp. 7-8.

[79] OSWER Directive #9834.7-1B, p. 3.

[80] OSWER Directive #9834.7, p. 8; see OSWER Directive #9834.7-1B, p.3.

[81] OSWER Directive #9834.7, p. 9.

[82] *See* OSWER Directive 9834.7-1B, p. 3.

[83] *See* 42 U.S.C. _9622(g)(1).

[84] OSWER Directive #9834.7-1B, p. 3.

[85] *See also supra* Section III.A.1.a. (discussing EPA's position that a *de minimis* settlement is inappropriate if all the defendants qualify for this status).

c. Timing of the Settlements

Two conditions must be met before a *de minimis* settlement is appropriate. First, EPA must have adequate information about the identity of the potentially responsible parties at the site, their waste contributions, and their financial viability.[86] This information is necessary so that the EPA can find that the nonsettling PRPs have sufficient solvency to ensure that the settlement is "practicable and in the public interest".[87] Accordingly, EPA guidance provides that although the Agency may engage in preliminary negotiations prior to completion of such investigatory work, "as a general rule" *de minimis* settlements should not be concluded before completion of a potentially responsible party search, a title search, and financial assessments, or before the Agency is confident that adequate information about the extent of each settling party's contribution to the site has been discovered.[88]

The procedures governing establishment of a list of the type and quantity of waste contributed by each PRP, also known as a waste-in list, are set forth is a separate EPA guidance document--*Guidance on Preparing and Releasing Waste-In Lists and Volumetric Ranking to PRPs under CERCLA*.[89] Information for these lists is gleaned from a variety of sources, including site records, interviews with PRPs, and title searches.[90] The Regions are directed to begin the PRP investigatory work concurrent with the expanded site investigation or, at the latest, the NPL scoring quality assurance process.[91]

Second, EPA must have adequate information about the cleanup costs. The guidance documents indicate that *de minimis* settlements "should not be pursued until the Agency is able to estimate, with a reasonable degree of confidence, the total response costs associated with cleaning up the subject site, including oversight and operation and maintenance costs."[92] Thus, according to EPA, such settlements are generally not appropriate until both the RI/FS and ROD have been completed at the site, or are close to being completed.[93] They may be concluded at an earlier stage, however, if the Agency is relatively certain of its ability to estimate future response costs, and the settlement takes into account the increased level of uncertainty through an adequate premium.[94]

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[86] OSWER Directive #9834.7, p. 10.

[87] OSWER Directive #9834.7, p. 10.

[88] OSWER Directive #9834.7, p. 11; *see* OSWER Directive #9834.7-1B, p. 4. In the case of *de minimis* settlements entered into before the completion of the PRP investigatory work, EPA should use more conservative criteria in distinguishing between *de minimis* and non*de minimis* parties. OSWER Directive #9834.7, p. 12.

[89] OSWER Directive #9835.16 (Feb. 22, 1991); *see also Potentially Responsible Party Search*, OSWER Directive #9834.3-1A (Aug. 27, 1987); *PRP Search Supplemental Guidance for Sites in the Superfund Program*, OSWER Directive #9834.3-2A (June 29, 1989).

[90] OSWER Directive #9835.16, p. 4.

[91] OSWER Directive #9834.7, p. 11.

[92] OSWER Directive #9834.7, pp. 12-13.

d. Settlement Negotiations

The guidance documents provide several instructions on how the Regions should conduct settlement negotiations. First, EPA will focus on comprehensive *de minimis* settlements, in which all *de minimis* parties at a site are included in a single agreement. In cases with large number of PRPs, however, the Agency may consider negotiating separately with steering committees representing substantial numbers of *de minimis* parties.[95]

Second, the *de minimis* parties are encouraged to organize and present offers to EPA. The documents also refer to the possibility to having the non*de minimis* parties propose *de minimis* settlements;[96] the major parties often perform the bulk of the cleanup activities, and might, under appropriate circumstances, be allowed to use the proceeds from *de minimis* settlements to finance such cleanups.[97] Significantly, however, there is no mention of the possibility that EPA might prepare a settlement offer and present it to the *de minimis* parties.

Third, the settlements should take the form of standardized agreements, and the Regions should avoid lengthy settlement negotiations over the terms of the agreements. To avoid the need for such negotiations, EPA prepared model consent decrees and administrative orders, which should be used as the basis for drafting site-specific documents.[98]

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[93] OSWER Directive #9834.7, p. 13; OSWER Directive #9834.7-1B, pp. 7-8. One document states that pre RI/FS and ROD *de minimis* settlements are inappropriate if they contain an expansive covenant not to sue--one without reservations of rights for cost overruns and for future response action. OSWER Directive #9834.7, p. 12. The other document states, without referring to the nature of the reopeners, that the ROD stage is the appropriate time for a *de minimis* settlement. OSWER Directive #9834.7-1B, p. 8. In fact, an early settlement that included a reopener for future action would be of limited utility, since the major portion of the liability would remain unresolved.

[94] OSWER Directive #9834.7, p. 13; OSWER Directive #9834.7-1B, pp. 7-8. Another example for which an early settlement might be appropriate is a case in which there are hundreds of parties that have contributed "extremely small volumes." OSWER Directive #9834.7-1B, p. 8.

[95] OSWER Directive #9834.7 pp. 5-6; OSWER Directive #9834.7-1B, p. 7.

[96] OSWER Directive #9834.7, p. 5; OSWER Directive #9834.7-1B, p. 7.

[97] *See infra* Section III.A.1.g. (discussing uses of *de minimis* moneys).

[98] OSWER Directive #9834.7, p. 5; OSWER Directive #9834.7-1B, p. 16.

Fourth, where EPA has sufficient information, it might inform PRPs of their *de minimis* status when it invokes the special notice procedures of section 122(e), under which the Agency can release general information about PRPs at a site as a means of facilitating settlements.[99] In addition, EPA might, at a general informational meeting, provide PRPs the materials--including model agreements--necessary to develop a *de minimis* settlement proposal.[100]

Fifth, EPA might consult with non*de minimis* parties about the terms of *de minimis* settlements. The reason adduced is that the volume and toxicity criteria established for participating in a *de minimis* settlement might affect the willingness of the major parties to settle. Moreover, for settlements occurring at the RD/RA stage, the *de minimis* settlement might be incorporated into a global settlement including the major parties.[101]

Sixth, as an incentive for *de minimis* parties to settle, EPA might use a tiered approach in which *de minimis* nonsettlers at a particular site might be offered, at a later time, a less advantageous settlement (generally, one with a premium to penalize them for not having settled earlier).[102]

Seventh, the Regions are not encouraged to devote extensive effort to assessing proposals for *de minimis* settlements unless there is a reasonable prospect of a successful settlement.[103]

e. Apportionment of Costs

The central factor that governs the allocation of costs is each party's percentage of the total volume of hazardous substances at the site. This percentage is revised by reallocating proportionately among the viable parties, the shares of parties that are insolvent or cannot be found. Thus, each party is responsible for a percentage of the liability that is larger than its volumetric share of the hazardous substances.[104]

The cleanup costs at a site have two components: past costs already expended by EPA, and expected future costs. The expected future costs are multiplied by a premium that covers the risk of underestimating response costs.[105] The past and expected future costs, augmented by the premium, are then allocated among the settling parties by reference to their revised percentage of the liability.[106] Interestingly, the amount of the settlement does not appear to reflect the risk that EPA will not prevail in the litigation.[107]

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[99] *See* 42 U.S.C. _9622(e)(1).

[100] OSWER Directive #9834.7, p. 6; OSWER Directive #9834.7-1B, p. 6.

[101] OSWER Directive #9834.7, pp. 5-6; OSWER Directive #9834.7-1B, pp. 7, 16.

[102] OSWER Directive #9834.7-1B, p. 8. This premium is analytically distinct from the premium paid in exchange for releases from the reopeners for cost overruns and future remedial action.

[103] OSWER Directive #9834.7, p. 7.

[104] OSWER Directive #9834.7, pp. 18-20; OSWER Directive #9834.7-1B, pp. 4, 12-13.

[105] The determination of this premium is discussed *infra* Section III.A.1.f.

f. Reopeners and Premiums

The guidance documents contemplate the use of up to four reopeners when EPA grants a *de minimis* party a covenant not to sue. Under the provisions of the statute,[108] natural resource damage claims should not be released unless the federal natural resource trustee has agreed in writing to such a release.[109]

Settlements should also generally include an "additional information" reopener, "which would allow the Government to seek further relief from any settling party if information not known to the Government at the time of the settlement is discovered which indicates that the volume or toxicity criteria for the site's *de minimis* parties are no longer satisfied with respect to that party.[110] Surprisingly, this reopener appears to be linked to the maximum volumetric contribution consistent with *de minimis* status, rather than to the volumetric contribution reflected in the settling party's payment. Suppose that at a particular site, EPA defines parties that contributed less than 1% of the waste as *de minimis*. A party that, at the time of the settlement appeared to have contributed only 0.4% but that was later shown to have in fact contributed 0.8% would appear not to be subject to the additional information reopener, even though it should have paid twice as much as it did.

The remaining two types of reopeners protect EPA against (1) the risk of cost overruns and (2) the risk that the cleanup will require response action that goes beyond that contemplated in the ROD. The Agency, however, may waive these reopeners in exchange for the payment of a premium, particularly if it has sufficient information to evaluate the likelihood of cost overruns or future response action. The size of the premium will be related to the level of uncertainty.[111] *De minimis* parties may also be given the choice of either paying a premium in exchange for EPA's waiving the reopeners for cost overrun and future response action, or not paying a premium and being subject to these reopeners. Alternatively, the settlement might fix the percentage of a party's contribution; the party might then pay for the past cost and be billed for the future costs when these are incurred.[112]

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[106] OSWER Directive #9834.7, pp. 19-20; OSWER Directive #9834.7-1B, pp. 12-13.

[107] The first guidance document states that the volumetric share may be adjusted by several factors, including litigative risk. See OSWER Directive #9834.7, p. 19. The second document, however, which sets forth an explicit formula for allocating response costs, makes no mention of factors other than volume. See OSWER Directive #9834.7-1B, pp. 12-13.

[108] 42 U.S.C. _9622(j)(2).

[109] OSWER Directive #9834.7, p. 15; OSWER Directive #9834.7-1B, p. 14. The federal natural resource trustee is the official designated under 42 U.S.C. _9607(f)(2) to protect the public interest in the natural resources. See also 40 C.F.R. _300.615.

[110] OSWER Directive #9834.7, p. 15; OSWER Directive #9834.7-1B, pp. 13-14. Such a reservation is not necessary if the Agency believes that the probability of discovering new waste information about the site is negligible. OSWER Directive #9834.7, p. 15.

g. Use of De Minimis Moneys

In general, a *de minimis* settlement takes the form of a "cash-out," in which the settling parties agree to pay a given sum in exchange for a release of their liability, rather than an agreement to perform remedial action at the site. The guidance documents set forth various rules for the uses of the proceeds of *de minimis* settlements. The past cost component of the settlement should be deposited in the Trust Fund (Superfund). The future cost component, including the premium, should also be placed in the Trust Fund except in the following circumstances:

1. If EPA is implementing the cleanup, the money can be placed in a site-specific special account managed by EPA;
2. In the case of state-lead cleanups, the money can be deposited in a state-managed escrow account, provided that there are safeguards to ensure that it will be used for the cleanup of the site;
3. If a global settlement is expected to follow shortly after the *de minimis* settlement, the funds can be deposited in a court managed escrow account for future distribution to the major settlers; and
4. If the *de minimis* settlement is part of a global settlement, the funds can be deposited in a PRP-managed trust fund or escrow account.[113]

It appears that under one important scenario, the future cost component and premium would have to be deposited into the Trust Fund and could not be made available later for financing the cleanup: if EPA and the state are not planning to conduct the cleanup, but negotiations with the major parties are not sufficiently advanced at the time of the *de minimis* settlement to suggest that a global settlement would follow shortly.

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[111] OSWER Directive #9834.7, pp. 16-18; OSWER Directive #9834.7-1B, pp. 12, 14. EPA had also provided guidance on appropriate premiums in *Guidance on Premium Payments in CERCLA Settlements*, OSWER Directive #9835.6 (Nov. 17, 1988). This directive, however, addresses primarily the question of covenants not to sue in settlements with non*de minimis* parties under section 122(f) rather than in settlements with *de minimis* parties under section 122(g).

[112] OSWER Directive #9834.7-1B, pp. 14-15.

[113] OSWER Directive #9834.7-1B, pp. 16-17.

h. Settlement Instruments

The statute provides that *de minimis* settlements can be embodied either in consent decrees or administrative orders, but that the latter must be approved by the Attorney General if the total response costs at the site exceed $500,000.[114]

Under the statute, settlements with non*de minimis* PRPs that provide for remedial action must be embodied in consent decrees.[115] Similarly, if EPA has already filed a lawsuit concerning a site, a consent decree might be appropriate. Apparently, in other cases, administrative orders are the appropriate instrument.[116]

2. The Revised Approach

On June 2, 1992, EPA issued a new guidance document on waste contributor settlements (Methodology for Early *De Minimis* Waste Contributor Settlements under CERCLA Section 122(g)(1)(A)[117]). The main purpose of this guidance document is to encourage Regions to enter into *de minimis* settlements prior to the completion of a ROD[118]--a practice that the prior documents had discouraged, at least implicitly.[119] The new approach focuses primarily on four of the areas discussed above: timing of the settlement, strategies for negotiation, reopeners and premiums, and use of *de minimis* moneys.[120]

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[114] 42 U.S.C. _9622(g)(4).

[115] 42 U.S.C. _9622(d)(1)(A).

[116] OSWER Directive #9834.7, p. 21-23.

[117] OSWER Directive #9834.7-1C (June 2, 1992), 57 Fed. Reg. 29312, (1992).

[118] OSWER Directive #9834.7-1C, p. 1.

[119] *See supra* Section III.A.1.c.

[120] With respect to the determination of public interest, the document states that collecting the proceeds of *de minimis* settlements early in the process would benefit all waste contributors (*de minimis* and non*de minimis*). OSWER Directive #9834.7-1C, p. 2. It summarily restates the approach of the prior guidance documents on *de minimis* status, *id.* at 9-10, and does not contain a discussion on the apportionment of costs among PRPs.

The new guidance document also suggests, in general, that an administrative order on consent is preferable to a consent decree for early *de minimis* settlements because, while providing similar legal effect, it can usually be issued more quickly and with the expenditure of fewer legal resources. It restates, however, the prior approach of favoring consent decrees where there is pending litigation involving the *de minimis* parties, or where the major parties agree to perform the RD/RA at the time of the *de minimis* settlement. *Id.* at 14.

a. Timing of the Settlements

The two prerequisites for *de minimis* settlement are adequate information about the identity, waste contribution, and financial viability of the PRPs, and adequate information about cleanup costs. With respect to the first requirement, the new guidance document does not change the original approach of first preparing a waste-in list and volumetric ranking of PRPs. It merely exhorts the Regions to give high priority to the early completion of this step: "[p]rocessing the waste-in information as soon as it is available should facilitate consideration of a *de minimis* settlement much earlier in the response process."[121]

Considerably more attention is focused on the second requirement. As already indicated, whereas under the original approach, *de minimis* settlements were discouraged until the completion of the ROD, the purpose of the new guidance document is to facilitate earlier settlements. Rather than waiting until there is reasonably reliable site-specific information about cleanup costs, the guidance document urges the Regions to estimate the expected costs by reference to other, similar sites. This process involves two steps: (1) acquiring sufficient information about contamination at the site to be able to identify the possible future response activities; and (2) learning about response costs at sites with similar characteristics.[122]

Pre-ROD information about site contamination can be acquired from several sources: early EPA study of the site in connection with the original site investigation and NPL scoring, or through the RI/FS, if one has been completed or is ongoing; prior removal actions (often undertaken to stabilize the site in order to prevent further contamination) or remedial actions at other operable units; and prior enforcement actions by state or local enforcement authorities.[123]

The guidance document directs the Regions to identify similar sites at which remedial action is ongoing. Relevant similarities are site type (*e.g.*, landfill), contaminated media (*e.g.*, groundwater), site location, and nature of contamination.[124]

Then, the Regions are asked to review post-1986 RODs to determine the selection of remedies at other sites with similar characteristics. If there is more current information concerning these RODs, because the remedy has been implemented or is in the process of being implemented, the Regions should use that information instead. Then, the Regions should determine, presumably from the RODs and any available post-ROD information, the cleanup cost of comparable sites.[125]

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[121] OSWER Directive #9834.7-1C, pp. 3-4.

[122] OSWER Directive #9834.7-1C, p. 5.

[123] OSWER Directive #9834.7-1C, p. 6.

[124] OSWER Directive #9834.7-1C, pp. 7, 11.

As an alternative to determining the response costs by surveying similar sites, the guidance document authorizes the Regions to establish unit costs for remedial technologies. This approach would require the development of a list of remedial technologies from RODs chosen or implemented for sites with similar characteristics. Unit costs would then be developed by matching the extent of contamination at a site for which a ROD has been prepared, with the estimated remedial cost.[126]

While the guidance document places in the Regions the bulk of the responsibility for determining the cleanup costs at comparable sites, it indicates that EPA Headquarters is taking some steps to ease this task. It states, without further elaboration, that the Office of Waste Program Enforcement "is collecting data to assist Regions in estimating future response costs for settlement by using information from sites with similar characteristics."[127] In addition, the Office of Emergency and Remedial Response "is exploring whether sufficient data exists to develop standardized or presumptive remedies for `generic' site types."[128] The desirability of this allocation of responsibility between EPA Headquarters and the Regions is discussed in Part IV.

b. Strategies for Negotiation

The guidance document also takes a somewhat different approach with respect to EPA's strategies for negotiating *de minimis* settlements. Whereas the prior documents did not contemplate the possibility that EPA might prepare a settlement offer and present it to the *de minimis* parties,[129] the new document indicates that the Regions may take two important affirmative steps: "assist in the formation of an early *de minimis* group (e.g., send out letters, hold meetings, publish notice in a local newspaper)" and "[s]end a draft settlement document to parties identified as *de minimis*, take comments over a specified period of time, and send the final settlement document (incorporating appropriate comments) to all *de minimis* PRPs for signature."[130]

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[125] OSWER Directive #9834.7-1C, pp. 7, 11. At the time that a Region has sufficient information both on the contamination at the site and the characteristics at similar sites, it should inform EPA Headquarters that the site is a candidate for an early *de minimis* settlement. The guidance document states that this notification "helps to assure that Headquarters resources are available to facilitate the settlement." *Id.* at 8.

[126] OSWER Directive #9834.7-1C, pp. 7-12.

[127] OSWER Directive #9834.7-1C, p. 7; see *id.* p. 11, n. 17, p. 12, n. 18.

[128] OSWER Directive #9834.7-1C, p. 7.

[129] *See supra* Section III.A.1.d.

Thus, the new approach does not require PRPs to bear the transaction costs of organizing a *de minimis* committee, which can be substantial for groups with several hundred parties. Moreover, individual firms can decide whether to settle without being subject to the wishes of the committee, which is likely to be dominated by the larger *de minimis* parties and by parties that are PRPs at many sites. The former are more likely to prefer bearing additional transactions to attempt a better settlement, and the latter may be more interested in the precedential value of a settlement.

c. Reopeners and Premiums

The guidance document focuses on the reopener that protects EPA against cost overruns and the need for future response action.[131] It expresses a definite preference for settlements that include a premium in exchange for waiving this reopener: "A primary goal of the Agency in an early *de minimis* settlement is to provide as much finality as possible to the *de minimis* parties. This reduces transaction costs to all parties, and reduces the possibility that the Agency will have to pursue the *de minimis* parties in the future for site-related costs."[132] In contrast, the original guidance appeared to be neutral on whether Regions should waive the cost overrun reopener in exchange for a premium.[133]

Of course, earlier settlements generally give rise to greater uncertainty. The premium charged in addition to a party's *pro rata* share of the response costs must compensate EPA for the risks associated with settling at a time when the future response action has not yet been chosen, possible cost overruns for a remedy that has not yet been selected, and potential inability to recover response costs from other sources.[134]

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[130] OSWER Directive #9834.7-1C, p. 13. Consistent with the prior approach, the Regions should discourage *de minimis* parties from commenting or negotiating over the boilerplate provisions, and should advise them that, if they reject a settlement offer, subsequent offers will be on less favorable terms. *Id.*

[131] The prior approach referred to two separate reopeners. *See supra* Section III.A.1.f. The new guidance document subsumes them both under the "cost overrun" rubric. OSWER Directive #9834.7-1C, p. 15, n. 25.

[132] OSWER Directive #9834.7-1C, p. 16. Regions may also offer each PRP the choice whether to pay a premium in return for a waiver of the cost overrun reopener. *Id.*

[133] *See supra* Section III.A.1.f

[134] OSWER Directive #9834.7-1C, p. 17.

d. Use of De Minimis Moneys

The guidance document states that the proceeds of *de minimis* settlements should generally be deposited in the Trust Fund. Two relevant scenarios are determined by whether the proceeds of the settlement are greater than EPA's expenditure of past costs. Even where this is the case, the deposit of the full amount into the Trust Fund might be appropriate. The Regions, however, may place the amount that exceeds EPA's past costs into a site-specific special account, or a state-managed escrow account or PRP-managed escrow account or trust fund.[135]

The guidance document contemplates, however, the possibility that if it would facilitate a settlement and the non*de minimis* PRPs have been cooperative during the settlement process, that the Region may apportion funds received between past costs and future costs without fully reimbursing the government for its past costs. The amount allocated to past costs should then be placed in the Trust Fund, but the remainder can be deposited into an account established for the site. The document states that allocating a portion of the settlement to future costs even where the government has not been fully compensated for its past cost can reduce the opposition of major parties to a *de minimis* settlement, since it makes available more money for funding the cleanup.[136]

Under the prior approach, it appeared that EPA could not make available the future cost component and premium to finance a private party cleanup unless negotiations with the major parties were sufficiently advanced.[137] The new guidance document is ambiguous as to whether this is still the case.[138]

B. Landowner Settlements

In 1989, EPA issued its only guidance document on *de minimis* landowner settlements (*Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property*[139]). The document primarily expands upon the three relevant statutory requirements, which provide that a landowner qualifies for *de minimis* status if it had no connection to the hazardous substances at the facility (other than through their ownership of the land), did not contribute to the release or threatened release through an act or omission, and did not purchase the property with actual or constructive knowledge of the presence of hazardous substances.[140]

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[135] OSWER Directive #9834.7-1C, p. 18.

[136] OSWER Directive #9834.7-1C.

[137] *See supra* Section III.A.1.g.

[138] *See* OSWER Directive #9834.7-1C, p. 18.

[139] OSWER Directive #9835.9 June 6, 1989, 54 Fed. Reg. 34,235 (1989).

The guidance document states explicitly that the factors that EPA considers in assessing *de minimis* landowner status are "substantially the same as the elements which must be proved at trial in order for a landowner to establish a third party defense."[141] The document places the burden on the landowner to present to EPA evidence to support its claim.[142] The type of settlement that EPA will then offer will be a function of the strength of this evidence.

Two possibilities are contemplated. "In some instances, a landowner may be able to make a thoroughly convincing demonstration that each of the elements of the third party defense have been satisfied."[143] In such cases, the settlement would require only that the landowner grant EPA access to the property and that it commit itself to taking due care with respect to the hazardous substances. Where the evidence is somewhat less strong, but the landowner "is nevertheless able to persuade the Agency that it is likely that [it] would prevail in establishing the third party defense at trial," a cash payment would also be required.[144] There is no discussion, however, of how such a payment would be computed and what relationship it would bear to the cleanup costs.

EPA can grant parties to *de minimis* landowner settlements covenants not to sue,[145] except in the case of natural resource damages.[146] Unlike the case of *de minimis* contributors, where the discussion of reopeners focuses on the problem of cost overruns, here the major concern is on the accuracy of the information establishing a party's *de minimis* status. EPA will reserve the right to seek further relief if new information shows that the landowner does not meet the requirements for a *de minimis* settlement. Because taking due care with respect to the hazardous substances is an element of the third-party defense,[147] and therefore a prerequisite for *de minimis* status, a landowner that qualified for a *de minimis* settlement might lose this eligibility if, following the settlement, it failed to take due care; in this situation, EPA could seek further relief. There is no explicit mention in the guidance document of a reopener for cost overruns.[148]

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[140] *See supra* Section I.D.

[141] OSWER Directive #9835.9, 54 Fed. Reg. at 34,237.

[142] This discussion focuses primarily on the "innocent purchaser" prong of 42 U.S.C. _9601(35)(A)(i), rather than on the prongs dealing with acquisition by government entities or by inheritance or bequest, 42 U.S.C. _9601(35)(A)(ii)-(iii).

[143] OSWER Directive #9835.9, 54 Fed. Reg. at 34,239-40.

[144] OSWER Directive #9835.9, 54 Fed. Reg. at 34,240.

[145] Recall that the statute requires EPA to determine that the grant of such covenants is in the public interest. *See supra* Section I.D. The guidance document does not explain the nature of this inquiry.

[146] *See supra* Section I.D.

[147] *See supra* Section I.D.

While given the same rubric in both the statute and guidance documents, *de minimis* landowner settlements differ from *de minimis* waste contributor settlements in several analytically important ways. First, for a given site, there may be many, sometimes even hundreds of *de minimis* waste contributors, but only one, or at most a very small number of *de minimis* landowners.[149] Thus, *de minimis* landowner settlements do not typically raise substantial revenues or simplify the litigation in substantial ways.

Second, *de minimis* waste contributors typically have no viable defenses to liability. Instead, they qualify for this status on the basis of the small share of hazardous substances contributed, and their payments are directly linked to their proportion of the total amount of hazardous substances at a site. In contrast, *de minimis* landowners often would qualify for a third-party defense and choose to settle merely to avoid expending the transaction costs necessary to establish their lack of liability. Moreover, the amount of their payment is dependent upon the strength of the evidence supporting their defense.[150]

The decision of a prospective purchaser of land will be greatly influenced by whether it can escape liability altogether and by the extent to which it can compromise such liability through settlement. In fact, the guidance document contemplates the possibility that EPA will grant a prospective purchaser a covenant not to sue in return for a substantial sum of money or the commitment to perform substantial response action.[151]

Fourth, as indicated above, in the case of landowner settlements, the landowner itself is the main source of evidence concerning *de minimis* status. In contrast, for waste contributor settlements, EPA is often the primary source of information.[152] In addition, estimating the cost of the cleanup does not appear to be a prerequisite for landowner settlements, particularly since such settlements do not necessaritly involve payments to EPA. Thus, such settlements do not raise the same types of questions about the appropriate timing for EPA's attempts to obtain *de minimis* settlements.

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[148] OSWER Directive #9835.9, 54 Fed. Reg. at 34,240.

[149] OSWER Directive #9835.9, 54 Fed. Reg. at 34,235.

[150] OSWER Directive #9835.9, 54 Fed. Reg. at 34,239-40.

[151] OSWER Directive #9835.9, 54 Fed. Reg. at 34,241. Technically, such a purchaser does not qualify for *de minimis* status, since it is acquiring the property with knowledge of the problem caused by the presence of hazardous substances.

[152] *See* OSWER Directive #9835.9, 54 Fed. Reg. at 34,239.

IV. Empirical Study of De Minimis Setsttlements

This section reports the results of an this empirical study of *de minimis* settlements entered on or before June 30, 1992. We study three questions: (1) how many *de minimis* settlements as a percentage of the universe of sites for which such settlements would be appropriate were entered? (2) when, during the long process of clean-up, were the settlements entered? and (3) what were the terms of the settlements?[153] We also seek to identify variations among settlements across sites and variations in regional practice as well as to identify possible explanations for these variations. In particular, we study regional differences in the use, timing, and terms of settlements, to determine whether they account for these variations across sites. We also identify other possible sources of heterogeneity and study the effects of these sources.

This empirical study is based primarily on the examination of the *de minimis* settlement documents. For our discussion of the relative use of *de minimis* settlements, we also rely, in part, on an EPA database that shows, for 957 sites on the NPL, the number of parties that received notice of their potential liability.[154]

Three important conclusions emerge from this study. First, *de minimis* settlements have been greatly underutilized. Such settlements have been entered in roughly one-fifth of the sites likely to benefit from such settlements.

Second, *de minimis* settlements have been entered very late in the cleanup process (on average about two years after the entry of the ROD). At a majority of sites, they have been entered as part of global settlement or settlements with major parties, or have been preceded by global settlements, thereby vitiating the congressional purpose of settling the liability of small contributors before EPA is in a position of doing so with large ones. In addition, the majority of *de minimis* settlement have been entered as consent decrees rather than administrative orders on consent, adding further delay to the settlement process and making it more cumbersome.

Third, there is great variation in the terms used for *de minimis* settlements, even ones for which the model administrative order and model consent decree adopted by EPA contemplates uniformity. These differences do not appear to be justified by site-specific factors.

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[153] This report will lead to a more comprehensive study of *de minimis* settlements, which we are currently preparing. Because we are missing a comparatively large percentage of landowner settlements, this report focuses on the terms of waste contributor settlements.

[154] This database excludes federal facilities and sites at which a state is taking the lead in the cleanup. Since federal facilities raise a special range of questions, and no *de minimis* settlement has been entered at such sites, this exclusion is desirable. Though including the number of sites at which the state takes the lead in the cleanup might be preferable, the number of sites at which this occurs is sufficiently small that their omission is unlikely to significantly affect the conclusions.

A. The Data

To compile the list of settlements entered in final form through June 30, 1992, we relied primarily on four lists: one sent to us by EPA in response to our request, one prepared by EPA in response to a request by Congressman Borski, one prepared by the Information Network for Superfund Settlements, and one that we generated using a database sent to us by EPA, which contains summary information about settlements. In addition, we searched the *Federal Register* for notices of settlements, and had discussions with attorneys at the EPA Regions. Unfortunately, there were serious inconsistencies in these various sources of information. For any settlement that appeared on at least one of these lists we attempted, primarily through conversations with EPA officials, to determine whether they in fact had been entered in final form (approved by the court in the case of consent decrees or by the Attorney General in the case of administrative orders at sites with cleanup costs over $500,000). We believe that, through June 30, 1992, there have been a total of 79 *de minimis* settlements (70 by waste contributors and 9 by landowners). Because several sites had multiple *de minimis* settlements, the 79 *de minimis* settlements involved only 52 sites; thus, 27 settlements occurred at sites that already had a *de minimis* settlement.

Even though we set out to perform a comprehensive analysis of the settlements, we have not yet been able to obtain copies of all the documents; unfortunately, there is no central library that contains *de minimis* settlements, and they are not collected by EPA Headquarters. So far, we have examined a total of 65 settlements (59 by waste contributors and 6 by landowners) entered at 45 sites. Our analysis of the terms of the settlement or other factors that rely on these documents is thus restricted to this smaller sample.

B. Number of Settlements

To draw some conclusions about the relative use of *de minimis* settlements, we rely on the EPA database containing information about the number of parties at each site. We assume that any site with twenty or more parties is likely to be a good candidate for such settlements: a total of 167 sites out of 957 sites meet this condition. There have been *de minimis* settlements in only 52. Thus, as a first approximation, one can say that more than two-thirds of the sites for which *de minimis* settlements are likely to be appropriate have not yet benefited from this tool. In addition, assuming that sites that are added to the NPL in the future have similar patterns for the number of PRPs involved, between 15 and 20% ought to be likely candidates for *de minimis* settlements.

We believe, however, that these figures actually overstate the use of *de minimis* settlements. Of the 45 sites in our sample, the database has information about the numbers of parties in only 32. Of these, in 11 of these (34%), the database shows that fewer than 20 parties got notice of their liability. Adjusting for these factors yields the following estimates:

> (1) of the sites currently on the NPL, 253 are suitable candidates for *de minimis* settlements; of these such settlements have been entered in only 52 (21%);
>
> (2) of the sites that will be added to the NPL in the future, over 25% will be suitable candidates for *de minimis* settlements.[155]

We now study regional variations in the numbers of settlements. Table I displays the distribution of settlements by region. For each region, we show the number of waste contributor settlements, landowner settlements, total settlements (the sum of the prior two columns), and of sites at which there were *de minimis* settlements. In each box, the first figure shows the actual number of settlements, whereas the second, which is in parentheses, is the number that we were able to analyze (82.3% of the settlements and at least one settlement at 86.5% of the sites).[156]

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[155] In calculating this number we assume that ratio of sites with more than twenty parties suitable for *de minimis* settlements to the sites with less than twenty parties suitable for *de minimis* settlements matches the ratio of rougly 2:1 that we found in our sample of 52 sites. Thus, the 253 candidate sites equals the 167 sites with more than 20 parties divided by .66.

[156] We are continuing to make efforts to obtain the remaining settlements, and hope to analyze them before the publication of the article that will be based on this report.

Table I: Regional Distribution of Settlements

Region	Waste Contributor Settlements	Landowner Settlements	Total Settlements	Total Sites
I	19 (17)	0 (0)	19 (17)	8 (7)
II	3 (2)	3 (2)	6 (4)	5 (4)
III	5 (4)	0 (0)	5 (4)	1 (1)
IV	8 (7)	1 (1)	9 (8)	8 (7)
V	20 (15)	1 (0)	21 (15)	13 (11)
VI	8 (7)	0 (0)	8 (7)	8 (7)
VII	1 (1)	1 (0)	2 (1)	2 (1)
VIII	0 (0)	2 (2)	2 (2)	2 (2)
IX	1 (1)	0 (0)	1 (1)	1 (1)
X	5 (5)	1 (1)	6 (6)	4 (4)
Total	70 (59)	9 (6)	79 (65)	52 (45)

Clearly, there is great regional variation in both the total number of *de minimis* settlements entered and in the number of sites with at least one *de minimis* settlement. As to the former, Regions V and I, with 21 and 19 settlements, respectively, account for more than half of the total number of settlements. No other region has 10 or more settlements, and three regions (VII, VIII, and IX) have two or fewer settlements.

With respect to the number of sites at which at least one *de minimis* settlement was entered, Region V leads by a large margin with thirteen (25% of the total). Three other regions (I, IV, and VI) each have eight sites, and four regions (III, VII, VIII, and IX) have two or fewer sites.

It is possible that the difference in the numbers of *de minimis* settlements across regions might be explained by differences in the numbers of NPL sites, or of NPL sites that are suitable for such settlements. As a proxy, we again use the number of sites with twenty or more parties in the EPA database.

Table II presents, for each region, the percentage of sites on the NPL, the percentage of NPL sites with twenty or more parties,[157] the percentage of *de minimis* settlements, and the percentage of sites at which at least one *de minimis* settlement was entered.

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[157] We also performed the calculation for sites with ten or more parties, and the differences in the percentages were not major.

Table II: Regional Distribution of NPL Sites, De Minimis Settlements, and Sites with De Minimis Settlements

Region	% of NPL Sites	% of NPL Sites with 20 or More Parties	% of *De Minimis* Settlements	% of Sites with *De Minimis* Settlements
I	7.8	16.2	24.1	15.4
II	19.7	7.8	7.6	9.6
III	14.6	16.8	6.3	1.9
IV	11.3	7.8	11.4	13.5
V	24.7	21.0	26.6	25.0
VI	2.5	9.0	10.1	15.4
VII	4.7	5.4	2.5	3.8
VIII	3.2	3.0	2.5	3.8
IX	7.0	7.8	1.3	1.9
X	4.4	5.4	7.6	9.6

Considering the percentage of sites on the NPL and the percentage of sites on the NPL with twenty or more parties changes some of the preceding conclusions. To approach the question somewhat systematically, we use the latter percentage (rather than the percentage of all NPL sites) as the best proxy for the number of sites at which a *de minimis* settlement might be appropriate. We also use the number of sites with at least one *de minimis* settlement as the best proxy for the use of this settlement tool. We make this choice because settling with parties at a site in a piecemeal fashion is not more desirable than doing it at once. Then, we define three ranges. Regions that the percentage of sites with *de minimis* settlements is more than 25% higher than the percentage of NPL sites with twenty or more parties are labeled high users of *de minimis* settlements; regions in which the former percentage is more than 25% lower than the latter are labeled low users, and the remaining are labeled average users.

Table II reveals the following:

(a) High users: Regions IV, VI, and X
(b) Average users: Regions I, II, V, and VIII
(c) Low users: Regions III, VII, and IX

This analysis reveals that the two regions with the highest number of total settlements (Regions I and V) and the region with the highest number of sites with at least one settlement (Region V) are not disproportionately high users of *de minimis* settlements.

C. Timing of the Settlements and Its Impact on Transaction Costs

The central congressional objective in designing the provisions for *de minimis* settlements was that EPA resolve the legal obligations of parties with a small share of liability as early as possible in the cleanup process. A corollary of this directive is that *de minimis* settlements are likely to be ripe earlier than settlements with major parties. As noted above, this different congressional treatment of the two groups stems from the different ratio of transaction costs to liability costs that they face.[158] In this Section, we evaluate the extent to which EPA has settled with *de minimis* parties before it was able to do so with major parties, the timing of the settlements relative to the different stages of the cleanup process, and the relative use of the less cumbersome settlement instrument.

1. Pure versus Nonpure Settlements

To analyze the question whether EPA is, in fact, entering into *de minimis* settlements before it is able to resolve the liability of the major parties, we define four separate categories of *de minimis* settlements: (1) *de minimis* settlements that are part of a global settlement; (2) settlements with only *de minimis* parties, but which were preceded by a global settlement; (3) settlements, other than global settlements, with both *de minimis* and major parties; and (4) pure *de minimis* settlements. In this taxonomy, we define a global settlement to be one pursuant to which the major parties, or a group of major parties, undertakes to perform the RD/RA at the site.[159] In all but the fourth category, EPA is resolving the liability of the major parties either consecutively with, or earlier than, the liability of *de minimis* parties. The distribution of settlements is shown in Table III.

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[158] *See supra* Section I.D.

[159] We do not include in category settlements in which the major parties undertake to perform only the RI/FS. We do include one settlement in which the major parties undertook only the operation and maintenance, and in which EPA performed the remainder of the RD/RA.

Table III: Pure de Minimis Settlements and Settlements Including Major Parties

Type of Settlement	Number of Settlements	Number of Sites
Global	20	20
Prior Global	9	3[a]
Major Parties	3	3
Pure *de Minimis*	33	19
Total	65	45

[a] To avoid double-counting, this box includes only sites for which the prior global settlement did not include a *de minimis* component. Otherwise, the site is included in the box above.

Table III shows that of the 65 *de minimis* settlements in our sample, only 33 (51%), were pure *de minimis* settlements. More importantly, of the 45 sites in our sample, there were pure *de minimis* settlements in only 19 (42%).[160] In all other cases, the *de minimis* settlement did not occur before EPA was in a position to resolve the liability of the major parties.

Table IV presents the regional distribution of the four types of settlements, and in parentheses, the number of sites at which such settlements occur. The comparison of Tables I and IV reveals that the distribution of sites with pure *de minimis* settlements is more even than the overall distribution of sites *de minimis* settlement. Indeed, the range for sites with pure *de minimis* is from zero (Region IX) to four (Region I), whereas the overall range is from one site (Regions III and IX) to eleven sites (Region V).

This observation suggests that the differences, revealed in Table I, in the number of sites with *de minimis* settlements may be attributable more to different rates of success in negotiating settlements with major parties, and less to success in negotiating earlier settlements with *de minimis* parties.[161]

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[160] Note, moreover, that our methodology may overestimate the number of pure *de minimis* settlements. Conceivably, some of them may have been preceded by settlements with major parties, but that the settlement document did not indicate this fact.

[161] This hypothesis cannot be conclusively tested without a study of all settlements with major parties--an undertaking that is well beyond the scope of this project. An alternative hypothesis might be that, though regions are equally successful in negotiating settlements with major parties, some regions prefer to formulate the global settlement as a *de minimis*settlement and a settlement with the major parties rather than as one, global settlement.

Table IV: Regional Distribution of Settlements by Reference to the Presence of Major Parties

Region	Global	Prior Global	Major Parties	Pure
I	3 (3)	3 (0)[a]	0	11 (4)
II	0	1 (1)	0	3 (3)
III	0	0	0	4 (1)
IV	2 (2)	2 (1)	2 (2)	2 (1)
V	7 (7)	2 (0)	1 (1)	5 (3)
VI	5 (5)	1 (1)	0	1 (1)
VII	0	0	0	1 (1)
VIII	0	0	0	2 (2)
IX	1 (1)	0	0	0
X	2 (2)	0	0	4 (3)
Total	20 (20)	9 (3)	20 (20)	33 (19)

[a] To avoid double-counting, this box includes only sites for which the prior global settlement did not include a *de minimis* component. Otherwise, the site is included in the box to the left.

Table V exhibits the relative distribution of waste contributor and landowner settlements. It shows that only 47% of *de minimis* waste contributor settlements (28 out of 59), but 83% of *de minimis* landowner settlements (5 out of 6) were of the pure type. Moreover, out of the sites with *de minimis* waste contributor settlements, there were pure settlements in only 37.5% (15 out of 40). In contrast, out of the sites with *de minimis* landowner settlements, there were pure settlements in 83% (5 out of 6).

Table V: Distribution of Waste Contributor and Landowner Settlements by Reference to the Role of Major Parties

Type of Settlement	Waste Contributor Settlements	Landowner Settlements
Global	20 (20)	0
Prior Global	8 (2)	1 (1)
Major Parties	3 (3)	0
Pure *de Minimis*	28 (15)	5 (5)[a]
Total	59 (40)	6 (6)

[a] One site had both a landowner and two waste contributor settlements. It is counted once in each column, resulting in a total of 46, rather than 45, sites.

This difference in the proportion of pure waste contributor and landowner settlements is significant. Landowner settlements typically involve only one, or at most a handful, of settling defendants. In contrast, waste contributor settlements often involve dozens, sometimes even hundreds, of defendants. Thus, waste contributor settlements are far more likely to result in a large aggregate saving of transaction costs. In evaluating the success of the program at reaching early *de minimis* settlements, the figures for waste contributor settlements are therefore more significant than the figures for all settlements.

2. Stage in the Cleanup Process

In this Section, we categorize the *de minimis* settlements by reference to the stage in the cleanup process at which they were entered. We define three stages: pre-RI/FS settlements are in Stage 1; settlements entered after the completion of the RI/FS but before the completion of the ROD are in Stage 2, and settlements entered after the completion of the ROD are in Stage 3.[162] In turn, for Stage 3 settlements, we indicate, by a number following the decimal point, the number of years, to the nearest whole year, that elapsed between the completion of the ROD and the entry of the settlement; thus, a settlement entered two years after the completion of the ROD would be indicated as being in Stage 3.2. For some post-ROD settlements, this information is missing; we denote them as being in Stage 3.M.[163] Finally, the category labeled "other" consists of removal, rather than remedial, actions.[164]

Table VI shows the distribution of all settlements as well as the distribution of the first *de minimis* settlement at each site.

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[162] Two of the sites in our sample had more than one physical location, and these locations were at different stages of the cleanup process. One of the sites had more than one operable unit, and these were at different stages of the cleanup process. In these cases, we considered the latest stage that the site had reached.

[163] Because few of the settlements that we obtained indicate the date on which they became final, we generally use, instead, the date on which notice of the settlement was published in the *Federal Register*, triggering a 30-day comment period. In cases in which there was no publication in the *Federal Register*, we used, instead, the date of the latest signature by the parties. Thus, our estimates actually understate the time elapsed since the signing of the ROD. Nonetheless, our casual observation suggests that it is unlikely that a settlement would undergo modification following the *Federal Register* notice, and that the major subsequent transaction costs are borne by EPA in responding to the comments. Thus, the method that we used may be a better proxy for the expenditure of transaction costs than the use of the dates on which the settlements became final.

[164] Two of the three sites in this category are not on the NPL. The remaining 43 sites in our sample are on the NPL.

Table VI: Timing of de Minimis Settlements

Stage	All Settlements	First Settlement at Each Site
1	1	1
2	3	3
3.0	4	3
3.1	10	10
3.2	13	11
3.3	20	10
3.4	2	0
3.5	2	0
3.M	6[a]	4
Other	4	3
Total	65	45

[a] Three of the settlements in this category are landowner settlements and two of these were the first *de minimis* settlement at a site. One of the three remaining landowner settlements in our sample was entered after the RI/FS but before the ROD; the two others were entered one and three years after the signing of the ROD.

The table shows that the vast majority of the settlements were concluded in the post-ROD period. Of the 61 settlements that involved remedial action, 57 (93%) were entered after the signing of the ROD. The distribution of first settlements is not dramatically different. Out of the 42 that involved remedial action, 38 (90%) were entered after the signing of the ROD.

Moreover, on average, considerable time elapsed between the signing of the ROD and the entry of the *de minimis* settlement. Of the sample of 51 post-ROD *de minimis* settlements with available data, the average lag between the ROD and the settlement was 2.24 years. Of the sample of 34 first *de minimis* settlements at a site, the average lag was 1.82 years.

To put these numbers in some perspective, recall from Section I.A that after the listing of a site on the NPL, on average 20 months elapse until the beginning of the RI/FS, 38 additional months until the issuance of the ROD and 43 additional months until the completion of the RD/RA--a total of 101 months from the NPL listing to the completion of the cleanup. Thus, the average post-ROD *de minimis* settlement is concluded 85 months after NPL listing, whereas the average first *de minimis* settlement at a site is concluded 80 months after NPL listing.[165]

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[165] We did not attempt to determine the actual date on which each site was listed on the NPL. We use the average statistics about the time that it takes sites to pass through the various stages of the cleanup process as a way of establishing a rough comparison of the transaction costs entailed in pre-ROD and post-ROD settlements.

Next, we take into account the three post-RI/FS but pre-ROD settlements and the single pre-RI/FS settlement, as well as of the seven post-ROD settlements for which we do not know the time elapsed following the ROD. We assume that the former were entered at the mid-point of the ROD and RI/FS processes, respectively, and the latter were average post-ROD settlements. Then, the average *de minimis* settlement is concluded 81 months after NPL listing and the average first *de minimis* settlement at a site is concluded 75 months after NPL listing.

There are no studies about the pattern of expenditure of transaction costs throughout the cleanup process. If one were to assume that the expenditures are evenly distributed over time, by the time the average *de minimis* settlement is entered, the *de minimis* parties have expended approximately 80% of the total transaction costs that would be expended if the case did not settle until after the completion of the cleanup.[166]

Consider the effects of accelerating the settlement process. If, instead, the average *de minimis* settlement was entered after the RI/FS but before the ROD, only 39 months would elapse between NPL listing and the settlement. The transaction costs expended, under the same assumption, would be only about half of what they are now. Even more dramatically, if the average *de minimis* settlement were entered before the RI/FS, only 10 months would elapse between the NPL listing and the settlement. The result, under the assumption of uniform expenditure of transaction costs, would be transaction costs approximately eight times lower than they are now.

In Table VII, we study the timing of the four categories of *de minimis* settlements that we defined on the basis of the role of major parties. Specifically, we attempt to determine whether there are significant differences between what we call nonpure settlements (global settlements, prior global settlements, and settlements major parties) on the one hand, and nonglobal settlements on the other. As before, the first number in each box counts all settlements; the numbers in parenthesis count only the first *de minimis* settlement at each site.

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[166] Of course, additional transaction costs would be expended if there were litigation rather than settlement following the conclusion of the cleanup. It is likely, however, that the discovery costs undertaken during the cleanup would be far greater than the costs of the trial.

Table VII: Relationship Between the Timing of Settlements and the Role of the Major Parties

Stage	Global	Prior Global	Major Parties	Total Nonpure	Pure *de Minimis*	Total
1	0 (0)	0 (0)	1 (1)	1 (1)	0 (0)	1 (1)
2	1 (1)	0 (0)	0 (0)	1 (1)	2 (2)	3 (3)
3.0	1 (1)	0 (0)	0 (0)	1 (1)	3 (2)	4 (3)
3.1	7 (7)	1 (1)	0 (0)	8 (8)	2 (2)	10 (10)
3.2	7 (7)	1 (0)	0 (0)	8 (7)	5 (4)	13 (11)
3.3	4 (4)	5 (2)	1 (1)	10 (7)	10 (3)	20 (10)
3.4	0 (0)	0 (0)	0 (0)	0 (0)	2 (0)	2 (0)
3.5	0 (0)	2 (0)	0 (0)	2 (0)	0 (0)	2 (0)
3.M	0 (0)	0 (0)	0 (0)	0 (0)	6 (4)	6 (4)
Other	0 (0)	0 (0)	1 (1)	1 (1)	3 (2)	4 (3)
Total	20 (20)	9 (3)	3 (3)	32 (26)	33 (19)	65 (45)

We use this table to compare the timing of nonpure and pure *de minimis* settlements. Taking into account all the settlements, 94% of the nonpure settlements (29 out of 31 relevant observations) and 93% of the pure settlements (28 out of 30 relevant observations) were entered after the signing of the ROD. Moreover, the average post-ROD nonpure settlement was entered 2.21 years after the issuance of the ROD, whereas the average post-ROD pure settlement was entered 2.27 years after the issuance of the ROD.

With respect to the distribution of first *de minimis* settlements at each site, 92% of the nonpure settlements (23 out of 25 relevant observations) and 88% of the pure settlements (15 out of 17 relevant observations) were entered after the signing of the ROD. Moreover, for post-ROD settlements, the average time elapsed from the issuance of the ROD was 1.87 years for nonpure settlements and 1.73 years for pure settlements.

As these statistics show, the average pure settlement is not entered significantly earlier than the average settlement in one of the categories involving major parties. This conclusion is somewhat counterintuitive. Indeed, a logical hypothesis, which our analysis seriously questions, is that pure *de minimis* settlements would be entered early in the cleanup process, at a time when the information necessary to resolve the liability of the major parties is lacking. Instead, it appears that the presence of pure *de minimis* settlements is attributable to site-specific difficulties, despite the presence of the necessary information, in negotiating settlements with major parties.

Table VIII shows, for the four regions with the largest number of *de minimis* settlements, the stage at which these settlements were entered. The first number in each box counts all settlements; the numbers in parenthesis count only the first *de minimis* settlement at each site.

Table VIII: Timing of Settlements for Selected Regions

Stage	Region I	Region IV	Region V	Region VI
1	0 (0)	1 (1)	0 (0)	0 (0)
2	0 (0)	0 (0)	1 (1)	0 (0)
3.0	3 (2)	0 (0)	1 (1)	0 (0)
3.1	2 (2)	1 (1)	2 (2)	3 (3)
3.2	3 (2)	1 (1)	5 (4)	2 (2)
3.3	5 (1)	2 (1)	4 (2)	2 (2)
3.4	2 (0)	0 (0)	0 (0)	0 (0)
3.5	2 (0)	0 (0)	0 (0)	0 (0)
3.M	0 (0)	1 (1)	0 (0)	0 (0)
Other	0 (0)	2 (2)	2 (1)	0 (0)
Total	17 (7)	8 (7)	15 (11)	7 (7)

None of the regions had more than one pre-ROD settlements. For the post-ROD settlements, the average time elapsed between the signing of the ROD and the entry of the settlement, taking into account all *de minimis* settlements, was 2.41, 2.25, 2, and 1.85 years for Regions I, IV, V, and VI, respectively. Taking into account only the first *de minimis* settlement at a site, the average time elapsed between the signing of the ROD and the entry of the settlement was 1.29, 2, 1.77, and 1.85 years for Regions I, IV, V, and VI, respectively. The figures for each of the regions are roughly within half a year of the overall averages of 2.24 years for all settlements and 1.82 years for first settlements. The regional differences in timing are therefore not dramatic.

3. Settlement Instruments

We are interested in the choice between the use of consent decrees and administrative orders on consent because the latter do not require the assent of a third party (the court) and do not provide a formal forum for objections by nonsettlers. Thus, a settlement embodied in an administrative order is likely to be less cumbersome and, controlling for the timing of the settlement, is likely to involve a smaller expenditure of transaction costs on the part of the settling parties.

Of the 65 settlements in our sample, 47 (72%) were embodied in consent decrees and 18 in administrative orders on consent. For waste contributor settlements, the division was 43 consent decrees (73%) and 16 administrative orders, whereas for landowner settlements, the division was 4 consent decrees (67%) and 2 administrative orders.

Table IX presents the distribution of the two types of instruments by reference to the role of the major parties in the settlement. The first number in each box counts all settlements; the numbers in parenthesis count only the first *de minimis* settlement at each site.

Table IX: Distribution of Settlement Instruments by Reference to the Role of the Major Parties

Type	Consent Decree	Administrative Order on Consent
Global	20 (20)	0 (0)
Prior Global	4 (2)	5 (1)
Major Parties	3 (3)	0 (0)
Pure	20 (8)	13 (11)
Total	47 (33)	18 (12)

The distribution of the first settlement at each site is almost identical to the overall distribution. Thirty-three out of 45 settlements (73%) were embodied in consent decrees.

Two of the four categories (prior global and pure) involve only *de minimis* parties. Some settlements in these categories used administrative orders and other consent decrees. In contrast, all of the settlements in the other two categories took the form of consent decrees; in fact, global settlements must take the form of consent decrees.[167]

Out of the 42 settlements in the categories that involve only *de minimis* parties, 24 (57%) were embodied in consent decrees. Of the 22 first settlements in these categories, only 10 (45%) took the form of consent decrees. In contrast, out of the remaining 20 settlements, 14 (70%) were entered as consent decrees. Thus, first settlements were significantly more likely than subsequent ones to be entered as administrative orders.[168]

Table X presents the timing of the settlements entered as consent decrees and administrative orders for the two categories involving only *de minimis* parties. Once again, the first number in each box counts all settlements; the numbers in parentheses count only the first *de minimis* settlement at each site.

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[167] *See supra* Section III.A.1.h.

[168] At two sites at which the initial settlement was entered as a consent decree, however, subsequent ones were entered as administrative orders.

Table X: Distribution of Settlement Instruments by Reference to the Timing of the Settlement

Stage	Consent Decree	Administrative Order
1	0 (0)	0 (0)
2	0 (0)	2 (2)
3.0	1 (0)	2 (2)
3.1	2 (2)	1 (1)
3.2	2 (2)	4 (2)
3.3	13 (4)	2 (1)
3.4	2 (0)	0 (0)
3.5	0 (0)	2 (0)
3.M	4 (2)	2 (2)
Other	0 (0)	3 (2)
Total	24 (10)	18 (12)

All 24 consent decrees and 13 of the 15 relevant administrative orders (87%) were entered after the ROD.

For the post-ROD settlements, the average lag between ROD and settlement was 2.65 years for consent decrees and 2.27 years for administrative orders.

For first *de minimis* settlements at a site, all 10 consent decrees and 8 out of 10 relevant administrative orders (80%) were entered after the ROD. For the post-ROD settlements, the average lag was 2.25 years for consent decrees and 1.33 years for administrative orders.

Using the same assumptions as above, the average consent decree was entered 90 months after listing on the NPL, whereas the average administrative order was entered 79 months after listing on the NPL. The corresponding figures for the first *de minimis* settlements at a site are 85 and 67 months, respectively. Thus, administrative orders are entered, on average, almost one year, earlier in the cleanup process than consent decrees. For first settlements, the difference is one-and-a-half years.

While we have not attempted to systematically study this causal connection, we believe that two factors are at play. First, at a later stage, there is likely to have been more judicial involvement in the case, and a consent decree might therefore seem more appropriate. Second, the lesser degree of formality might speed up the settlement process.

In summary, an independent cost of resolving the liability of *de minimis* parties by means of global settlements, and of delaying the entry of such settlements, is the greater likelihood--indeed, the certainty in the case of global settlements--that the settlement instrument will be a consent decree rather than an administrative order.

D. Terms of De Minimis Settlements for Waste Contributors

We focus in this Section of three issues. First, we study the maximum volumetric contribution consistent with *de minimis* status. Second, we analyze the four principal reopeners contemplated in the guidance documents: additional information, damages to natural resources, cost overruns, and further response action. Finally, we study the premiums used in exchange for the waiver of the latter two reopeners.

1. Maximum Volumetric Contribution

Out of our sample of 59 waste contributor settlements, we eliminated four categories. First, some settlements did not indicate the volumetric cutoff and merely restated the statutory standard that the contributions of the parties offered a settlement were minimal in comparison to the other hazardous substances at the facility. Second, some settlements expressed the maximum permissible volume in gallons, but did not indicate the total number of gallons at the site; thus, we were not able to calculate the percentage contributions. Third, for sites with multiple settlements, we considered only one settlement, except in the one case in which the cutoffs were different.[169] Fourth, in one site, the two settling parties contributed a very small amount of waste--lower than any of the cutoffs in other cases, and the settlement merely said that these amounts satisfied the requirements for *de minimis* settlements.[170]

We were left with 28 observations, revealing a range of 0.1% to 10%. These cutoffs therefore differ by a factor of 100. It is possible, however, that the 10% cutoff is somewhat aberrational because it involved a case in which the only settling party was the U.S. Air Force. Eliminating this settlement reduces the range to 0.1% to 2.5%--still a ratio of 25. Recall that the 1989 guidance document referred to a range of 0.2% to 2%.[171] Since, then, the range had increased two-and-a-half times.

We believe that two factors are the likeliest candidates to explain the differences: the EPA region that entered the settlement and the numbers of parties offered the settlement. As to the former, since the Superfund program delegates considerable discretion to the regions, and the guidance documents are not clear as to what the cutoff should be, it is possible that different regions would adopt disparate policies.

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[169] The first waste contributor settlement in this case used a cutoff of 2.5% but the second used a cutoff of 0.85%.

[170] The percentage contributions were 0.071% and 0.051%, respectively. We did include, however, a settlement that stated the amount contributed by the single settling party (0.7%) and indicated that this amount was consistent with *de minimis* status. The reason was that in this case, the contribution was higher than cutoffs for other settlements.

[171] *See supra* Section III.A.1.b.

As to the latter, the overall number of PRPs at an NPL site varies greatly, from almost one thousand to only one. A condition for *de minimis* settlements is that a sufficiently large proportion of the liability remain unresolved. For a given proportion of unresolved liability, the cutoff for *de minimis* status is likely to decrease as the number of parties increases. For example, at a site with 50 waste contributors, a 1% cutoff, covering 40 parties, might leave 90% of the liability unresolved. In contrast, at a site with 200 waste contributors, it could take a cutoff of 0.5%, which would accord *de minimis* status to 120 PRPs to leave the same proportion of the liability unresolved. Thus, in general, one would expect that sites in which a larger number was offered a settlement would have a smaller cutoff.[172]

Table XI shows for each different cutoff used, the number of settlements using that cutoff, the region in which the settlements were entered, and the range of the number of parties offered the settlement. For this purpose, we define the following ranges:

(a) Range 1: 9 or fewer parties;
(b) Range 2: 10-19 parties;
(c) Range 3: 20-49 parties;
(d) Range 4: 50-99 parties;
(e) Range 5: 100 or more parties.

Where a region entered more than one settlement with a given cutoff, the number of such settlements is indicated in parentheses.

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[172] The problem is actually somewhat more complicated. It is possible that, for some settlements, EPA has extended the offer only to a subset of the qualifying parties. In those cases, it would be more appropriate to consider the number of parties below the cutoff. The full analysis of this question would require the examination of the waste-in lists, which are almost never appended to the settlements.

It might also be appropriate to consider, instead, the total number of parties at a site. We attempted to do this, using a database prepared by EPA that contains, for each site, the number (and identity) of the parties that received formal notice of their potential liability. We noticed, however, that in several cases, this number was smaller than the number of parties offered a de minimis settlement, indicating that EPA does not send notices to all PRPs.

We also had difficulty, in some cases, in distinguishing between the number of parties that were offered the settlement and the number that accepted the settlement. In some cases, the appendix lists all the parties below the cutoff and there is therefore no ambiguity. In other cases, however, the body of the settlement contains the identity of the settling parties. It is possible, in these cases, that other parties may have been offered the settlement as well and rejected it, but there is no way to tell from the settlement documents. In those cases, we used the number mentioned in the settlement. This problem is present primarily in cases involving a small number of parties.

Table XI: Percentage Cutoffs in Ascending Order

% Cutoff	# of Settlements	Region	Range of # of Parties
0.1	1	V	5
0.1455	1	V	5
0.2	2	I	5
		V	3
0.25	1	VI	5
0.32	1	VII	1
0.4499	1	V	5
0.6	1	V	1
0.7	1	I	1
0.714	1	I	5
0.85	1	X	1
1	11	I(3)	2, 5(2)
		II(1)	2
		IV(4)	1, 2, 4, 5
		V(2)	4, 5
		VI(1)	M
1.2	1	V	4
1.36	1	X	4
1.6	1	VI	1
2	1	X	4
2.5	1	X	1
10	1	X	1

It is interesting that 11 of the 28 settlements (39%) used a single cutoff: 1%. One other cutoff (0.2%) was used by two settlements. All the other cutoffs were used by only one settlement. Six settlements used cutoffs above 1% and 11 used cutoffs below 1%.

No other cutoff was used by more than two settlements.

To enable a clearer analysis of potential regional disparities in the choice of percentage cutoffs, Table XII shows these cutoffs sorted by region. It also provides, for each settlement, the range of the number of parties.

Table XII: Percentage Cutoffs (Sorted by Region)

Region	# of Settlements	% Cutoffs	Range of # of Parties
I	5	0.2	5
		0.7	1
		1	2, 5(2)
II	1	1	2
III	0	N.A.	N.A.
IV	4	1(4)	1, 2, 4, 5
V	9	0.1	5
		0.1455	5
		0.2	3
		0.4499	5
		0.6	1
		0.714	5
		1(2)	4, 5
		1.2	4
VI	3	0.25	5
		1	M
		1.6	1
VII	1	0.32	1
VIII	0	N.A.	N.A.
IX	0	N.A	N.A.
X	5	0.85	1
		1.36	4
		2	4
		2.5	1
		10	1

The table reveals that region IV used the same cutoff (1%) in all four settlements. These settlements covered the whole spectrum of the range of the number of parties. Region I used a single cutoff (also 1%) in three of the five settlements, and Region V used the 1% cutoff in two of its nine settlements. With the exception of these three cases, no region used a single cutoff in more than one case. With the exception of Region IV, it is difficult to discern from this table any consistent intra-regional approaches to the determination of cutoffs.

Table XIII sorts the percentage cutoffs by the range of number of parties, to help assess the extent to which this factor accounts for the variability in cutoffs.

Table XIII: Percentage Cutoffs (Sorted by the Range of the Number of Parties)

Range of # of Parties	# of Settlements	% Cutoffs	Region
1	8	0.32	VII
		0.6	V
		0.7	I
		0.85	X
		1	IV
		1.6	VI
		2.5	X
		10	X
2	3	1(3)	I, II, IV
3	1	0.2	V
4	5	1(2)	IV, V
		1.2	V
		1.36	X
		2	X
5	10	0.1	V
		0.1455	V
		0.2	I
		0.25	VI
		0.4499	V
		0.714	V
		1(4)	I(2), IV, V
M	1	1	VI

For each of the ranges with several settlements, there is a large variation in the cutoffs used. Perhaps most surprising, is the variation in Range 5 (more than 100 parties offered a settlement), where cutoffs from 0.1% to 1% were used. The differences are not explained by different regional policies: in the latter range, Region V spanned the whole spectrum.

2. Reopeners

a. Additional Information on Volume

Of the 59 settlements in our sample, 50 (85%) used a reopener to be triggered by additional information on the settling party's volumetric contribution. Of the 40 sites with at least one *de minimis* settlement by waste contributors, this additional information reopener was used in 34 (85%). Two of these sites (both in Region I) involved multiple settlements in which the reopener was used for some settlements but not others.[173] In addition, the reopener was not used in six other sites (in Regions I, II, IV, V, and, in two in Region X)

The nature of the additional information that will trigger this reopener varies greatly across settlements. The following formulations are used:

(1) the volume contributed by the settling party is greater than the cutoff used to determine *de minimis* status;[174]

(2) the settling party's actual volumetric contribution exceeds the amount attributed to it at the time of the settlement (and the reopener is triggered);[175]

(3) the settling party's actual volumetric contribution exceeds the amount attributed to it at the time of the settlement (but the reopener is not triggered; instead, the settling party pays an additional proportional amount);

(4) the settling party's actual volumetric contribution significantly exceeds the amount attributed to it at the time of the settlement;

(5) the settling party made material misrepresentations concerning its volumetric contribution; and

(6) the settling party made any misrepresentations concerning its volumetric contribution.

Table XIV shows the regional distribution of the various triggers. For each site with multiple settlements, if the settlements include a reopener for additional information concerning volume, the triggers are identical. Thus, the table displays the trigger information for one settlement per site. The table identifies the triggers by the numbers set forth in the preceding paragraph, and indicates instances of more than one trigger per settlement.

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[173] One of these instances involved two settlements with parties having limited solvency. Perhaps this factor accounts for the different treatment of these settlements. The explanation in the other instance is less easily discernible.

[174] In two settlements that use this formulation, the actual cutoff is not indicated.

[175] In one case using this formulation, there is an exception for changes that result from recomputations of the contributions of the major parties.

Table XIV: Triggers for the "Additional Information" Reopener with Respect to Volume

Region	(1)	(2)	(4)	(1)&(3)	(1)&(5)	(1)&(4)	(1)&(6)
I	3	0	0	0	2	0	1
II	1	0	0	0	0	0	0
III	0	0	1	0	0	0	0
IV	3	2	0	0	0	0	0
V	3	1	2	3	0	1	0
VI	7	0	0	0	0	0	0
VII	0	1	0	0	0	0	0
VIII	0	0	0	0	0	0	0
IX	1	0	0	0	0	0	0
X	2	0	0	0	0	0	0
Total	20	4	3	3	2	1	1

The table shows that the most common trigger is the cutoff for *de minimis* status (Trigger 1)--the only one contemplated in the guidance documents.[176] It was used in 20 out of 34 instances (59%). Five regions (Region I, II, VI, IX, and X) used it for all its settlements, though Region I occasionally coupled it with another trigger. Two other regions (Regions III and VII), in contrast, never used it. The remaining two regions with waste contributor settlements (Regions IV and V) used it in some sites but not in others. Of these, Region V used the greatest number of different formulations. Its ten settlements used five different types of triggers.

b. Additional Information on Toxicity

Of the 59 waste contributor settlements in our sample, 46 (78%) used a reopener to be triggered by additional information on the toxicity of the wastes contributed by the settling party. Of the 40 sites with at least one *de minimis* settlement by waste contributors, this additional information reopener was used in 30 (75%). Two of these sites (both in Region I) involved multiple settlements in which the reopener was used for some settlements but not others.[177] In addition, the reopener was not used in ten other sites (in Regions I, II, IV, in two in Region V, in three in Region VI, and in two in Region X). Four of these settlements used the "additional information" reopener for volume but not for toxicity (in Region V and three in Region VI). There were no settlements for which the opposite was true.

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[176] *See supra*Section III.A.1.f.

[177] One of these instances involved two settlements with parties having limited solvency. Perhaps this factor accounts for the different treatment of these settlements. The explanation in the other instance is less easily discernible.

There is some variation with respect to the triggers, but less than in the case of the reopener for additional volumetric information. For each site with multiple settlements, if the settlements include a reopener for additional information concerning volume, the triggers are identical. As in the preceding subsection, in these cases we count only one trigger per site.

Recall the statutory requirement that the toxic or other hazardous effects of the substances contributed by a *de minimis* party be "minimal in comparison to other hazardous substances at the facility."[178] The guidance documents, in turn, require that the substances not be "significantly more toxic and not of significantly greater hazardous effect than other substances at the facility," whereas the model administrative order and consent decree requires that the substances not "contribute disproportionately to the cumulative toxic or other hazardous effects of the hazardous substances at the Site."[179] At 24 sites, the reopener is triggered by additional information showing a violation of one of these requirements. We do not provide a breakdown for these alternatives because we believe that EPA uses them interchangeably.

This standard trigger appeared at four additional sites (all in Region I) in combination with another trigger. At two of these sites, the reopener was also triggered if the certifications made by the settling parties were materially inconsistent with information in their possession at the time of the certification. At one site the additional trigger was any misrepresentation by the settling party. At the fourth site the reopener was also triggered if the additional information revealed that the settling party had contributed PCBs, or substances containing PCBs.

At one site (in Region III), the reopener was triggered if additional information revealed that the toxicity of the substances contributed by a *de minimis* settlor materially exceeded the toxicity attributed to those substances at the time of the settlement. Finally, at one site (in Region VII), the reopener was triggered if additional information showed that the settling party had contributed substances other than asbestos.

c. Damages to Natural Resources

The statute provides that any settlement, including a *de minimis* settlement cannot contain a covenant not to sue for damages to natural resources under the trusteeship of the United States unless the federal natural resource trustee has agreed in writing to such a covenant.[180]

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[178] *See supra* Section I.D.

[179] *See supra* Section III.A.1.b.

The settlements exhibit the following approaches toward the reopener for damages to natural resources (some settlements use a combination of more than one of these approaches):

(1) the covenant not to sue explicitly excludes claims for damages to natural resources;

(2) the covenant not to sue explicitly includes claims for natural resources damages except those that may be asserted by one federal trustee;

(3) the covenant not to sue explicitly includes only federal claims for damages to natural resources;

(4) the covenant not to sue does not exclude claims for damages to natural resources;

(5) the covenant not to sue includes claims for damages to natural resources and indicates that the federal natural resources trustee has agreed to this waiver;

(6) the covenant not to sue includes claims for damages to natural resources and indicates that the federal natural resources trustees have agreed to the waiver, but the settlement provides that one of the trustees may payment from the settling parties up to a specified amount;

(7) the covenant not to sue includes claims for damages to natural resources but there is no indication that the federal natural resources trustee has agreed to this waiver.

(8) the covenant not to sue does not exclude claims for damages to natural resources but the settlement includes a payment for such damages; and

(9) the covenant not to sue explicitly includes claims for damages to natural resources and the settlement includes a payment for such damages.

Table XV shows the regional distribution of the various formulations. Because there is considerable variation in the use of this reopener among settlements concerning the same site, in this section we categorize all 59 waste contributor settlements in our sample. For boxes in which there were multiple settlements at a given site, we indicate the number of sites after a slash. The table identifies the different formulations by the numbers set forth in the preceding paragraph.

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[180] *See* 42 U.S.C. _9622(j)(2).

Table XV: Reopener for Damages to Natural Resources

Reg.	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
I	2/1	1	0	4	2/1	6/1	0	1	1
II	0	0	0	1	0	0	0	1	0
III	0	0	0	1	0	0	3/1	0	0
IV	6/5	0	0	1	0	0	0	0	0
V	8/6	0	4/2	1	0	0	0	2	0
VI	5	0	0	2	0	0	0	0	0
VII	1	0	0	0	0	0	0	0	0
VIII	0	0	0	0	0	0	0	0	0
IX	5/4	0	0	1	0	0	0	0	0
X	0	0	0	0	0	0	0	0	0
Total	27/22	1	4/2	11	2/1	6/1	3/1	4	1

The table shows that the most common formulation is the one in which the settlement's covenant not to sue excludes damages to natural resources. It was used in 27 out of 59 cases (46%). In an additional eight cases (14%), the covenant includes such claims but expressly indicates compliance with the statutory requirement that the federal natural resources trustee agreed to the waiver.

In the remaining 24 instances (41%), the covenant not to sue does not fully exclude federal claims for damages to natural resources, but there is no indication that the statutory requirement of written consent from the federal trustee has been met. In 19 of these cases (32%), the settlement does not explicitly refer to a payment for natural resources damages. It may be, in these cases, (1) that the natural resources in question were not under the trusteeship of the United States, (2) that there was no damage to natural resources under the trusteeship of the United States, (3) that the trustee agreed to the covenant not to sue despite the lack of reference to such agreement in the settlement, or (4) that the statutory requirement concerning the covenant not to sue for damage to natural resources was violated.

The table also reveals great lack of uniformity within some regions. Most notably, Region I used seven of the nine formulations, and Region V used four of the nine.

d. Cost Overruns and Further Response Action

The vast majority of the settlements do not include reopeners for either cost overruns or further response action. These reopeners are missing in 50 of the 59 settlements in our sample (85%), covering 33 of the 40 sites (83%).

The remaining nine settlements, which pertain to seven sites, take the following approaches:

(1) Three settlements, covering two sites (both in Region X), include only reopeners for further response action but not for cost overruns;

(2) Two settlements (in Regions II and VI) contain reopeners for cost overruns and further response action only if the cleanup costs exceed a pre-determined amount greater than the estimate of cleanup costs at the time of the settlement;

(3) Two settlement involving one site (in Region V) gave the parties the choice between paying a higher premium and not being subject to reopeners for cost overruns and further response action, or paying a lower premium and facing these reopeners;

(4) One settlement (in Region IV) covers only past costs and provides that the settling parties will pay a pre-determined percentage of the future costs; and

(5) One settlement (in Region II) includes both reopeners.

3. Premiums

The guidelines contemplate that the reopeners for cost overruns and further response action can be waived in return for the payment of a premium.[181] Unfortunately, our analysis of this issue is somewhat hampered because the settlements often do not explain how they determine each party's payment and it is therefore not possible to ascertain whether the parties are paying a premium in addition to their volumetric share of the cleanup costs. Such information was lacking in 17 settlements, accounting for 16 sites.

A large majority of the remaining 42 settlements, in our sample, which involved 25 sites,[182] charged *de minimis* parties a premium. This approach was followed in 38 settlements (90%). No premium was charged in four settlements, involving three sites. Two of these were the last two settlements discussed in the preceding section, in which the parties either had committed themselves to pay a percentage of the future costs or faced reopeners for cost overruns and further response action. In the other two cases (involving a single site in Region I) the parties had limited solvency and the settlement took account of this fact.

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[181] We do not deal here with premiums charged to parties because of their failure to accept an earlier settlement offer.

[182] At one site (in Region I), information about the use of a premium was missing for two settlements, a premium was charged in four settlements, and no premium was charged in two settlements.

Of the 38 settlements in our sample for which we know that EPA charged a premium, information about how the premium was computed cannot be discerned in eight settlements, covering six sites. As to the other settlements, there is an important inconsistency in the approach followed. Some charge as a premium a percentage of the total cleanup costs at the site whereas others charge a percentage of only the future cleanup costs at the site. Thus, a party charged a 50% premium on total cleanup costs of $1,000,000 pays its proportionate share based on costs of $1,500,000 while a party charged a 50% premium on future (estimated) clean-up costs of $800,000 pays its proportionate share of actual costs already incurred and its proportionate share of $1,200,000.

In 9 of the remaining 30 settlements, involving 6 sites, the premium was charged only on the estimated future costs. In 7 of these 9 settlements (involving 5 of the 6 sites), a fixed percentage was charged. These premiums ranged from 75% of the estimated future costs to 250%.[183] In all of these cases, EPA waived the reopeners for cost overruns and further response action. In the other settlements (1 site), the settling parties were given the choice between a premium of 50% with reopeners for cost overruns and future response action, or a premium of 150% without these reopeners.

In 1 of the 30 settlements, the premium was a percentage of past costs (10%) and a different percentage of future costs (50%). In this settlement, EPA waived the reopener for cost overruns, but retained the reopener for further response action.

In 20 settlements (10 sites), the premium was charged on the basis of total costs: past costs plus expected future costs. In 18 of these cases (8 sites), a fixed percentage was used: these ranged from 20.95% to 210%.[184] Except in 2 of these settlements (1 site), EPA waived the reopeners for cost overruns and further response action. In the remaining case, it waived only the cost overrun reopener. The premiums charged in these settlements were 20.95% and 25%. Eliminating them changes the lower end of the range to 53.33%.

One of the 20 settlements charged a premium of 100% to parties that had contributed less than 1% of the wastes and 50% to parties that had contributed more than 1%. The other settlement charged a premiums of 60 and 200%, respectively, for costs involving the first and second operable units.

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[183] This large premium might be explained, at least, in part by the fact that the settlement applied only to a party with a minuscule contribution, and that the party's total payment was only $510. The next highest premium in this category was 180%.

[184] It is possible, though we could not tell from the text of the settlement that the 210% premium includes a 100% premium for failing to have settled earlier. *See supra* note 181. Indeed, this settlement is the third at a site, and the previous two charged a premium of 110%. Even if this were the case, however, the range would not change dramatically; the next highest premium is 200%.

We now seek to determine whether this large variation is attributable to different policies on the parts of the regions, or whether it is attributable to different stages in the cleanup process. With respect to the latter factor, one would expect that uncertainty with respect to cleanup costs would decrease at later stages in the cleanup process and that smaller premiums would then be required.

We define the following ranges of premiums:

(a) Range 1: less than 100%;
(b) Range 2: greater than or equal to 100 and less than 200%;
(c) Range 3: greater than 200%.

For each range we use the letters *F* and *T* to denote that the premium is charged on future costs and total costs, respectively.

For consistency, we include only settlements that waived both the reopeners for cost overruns and further response action. In the case of the settlements with variable percentages, we use the higher in the case of different percentages based on the contributions of the parties (because the smaller parties, which paid a higher percentage, were far more numerous) and the lower in the case of different percentage for operable units (because we use the date of the first ROD to determine the site stage in the cleanup process). Where the number of sites is different from the number of settlements, we indicate it following a slash.

Table XVI shows the regional distribution of premiums. It shows that, for settlements that charged a premium on total costs, the most prevalent range was Range 1. It was used in 11 out of 18 settlements (61%), involving 4 out of 10 sites (40%). In 5 out of the 18 settlements, (28%), covering 4 out of 10 sites (40%), Range 2 was used. Only 2 settlements (11%), involving 2 sites (20%), used Range 3.

In contrast, for settlements that charged a premium only on future costs, the most prevalent range was Range 2. It was used for 7 out of 9 settlements (78%), covering 5 out of 7 sites (71%). The lower and higher ranges were used only in one settlement each.

Table XVI: Regional Distribution of Premiums

Region	1F	1T	2F	2T	3F	3T
I	0	6/2	0	2	0	0
II	0	0	0	0	0	0
III	0	4/3	0	0	0	0
IV	1	0	1	0	1	0
V	0	0	5/3	2/1	0	2
VI	0	1	0	0	0	0
VII	0	0	1	0	0	0
VIII	0	0	0	0	0	0
IX	0	0	0	0	0	0
X	0	0	0	1	0	0
Total	1	11/4	7/5	5/4	1	2

The fact that, in general, a lower premium was charged when the premium is levied on total costs might suggest some consistency in approach. It is possible, of course, that the premium is computed on the future cost component only, but that it is then expressed as a percentage of total costs. There is nothing in the settlements, however, to indicate that EPA is following such an approach. In fact, where the premium is charged on the total costs, the settlements generally do not separate the future cost component.

With respect to intra-regional inconsistencies, we can make two observations. First, one region (Region V) charged a premium on the future cost component in some settlements and on total costs in other settlements. Second, the two regions with the largest numbers of settlements (Regions I and V) exhibited considerable variation in the amount of premiums charged.

Table XVII shows the relationship between the premium charged and a site's stage in the cleanup process. The table does not suggest that higher premiums are charged earlier in the cleanup process. For example, the 1T, 2T, and 3T premium ranges each contain sites in Stages 3.0 and 3.3. Moreover, for premiums levied only on the future cost component, the two sites in Stage 3.3 are in Range 1 and Range 3, respectively, whereas all of the sites in Range 2 are in earlier stages of the cleanup process.

Table XVII: Relationship Between Premiums
and Stage in the Cleanup Process

Stage	1F	1T	2F	2T	3F	3T
2	0	0	1	0	0	0
3.0	0	2/1	0	1	0	1
3.1	0	2/1	2	2	0	0
3.2	0	1	2/1	1	0	0
3.3	1	6/2	0	1	1	1
Other	0	0	2/1	0	0	0
Total	1	11/5[a]	7/5	5	1	2

[a]The number of sites is different than in Table XVI because, for some sites, the settlements took place at different stages in the cleanup process.

E. Summary

Our empirical study offers clear answers to the three questions we posed at the outset of this section. First, *de minimis* settlements have been underutilized as a settlement tool. EPA has invoked them at roughly 20% of the sites at which they might be used. Second, even at those sites at which *de minimis* settlements have been employed, they have been entered into only late in the process, often in conjunction with settlements with major parties, and generally using the most formal settlement tools. This use is at odds with the congressional intent for the use of *de minimis* settlements. Third, important terms of the settlements, including the triggers for some reopeners and the premiums charged for them, vary substantially across sites.

V. Surveys of EPA Regional Offices and Private Attorneys

During May and June 1992, we administered a detailed questionnaire to attorneys in all ten EPA regional offices. We first obtained from EPA Headquarters the names of the attorneys most familiar with *de minimis* settlements. We also obtained from William A. White, Esq., the Enforcement Counsel for Superfund, a letter urging these individuals to cooperate with our study. We then wrote to the attorneys, and indicated in an attachment, the types of questions that we would be asking. We conducted the survey by telephone, using as a guide a more detailed form that we had prepared. In

June and July 1992, we conducted a survey of attorneys who had represented *de minimis* and non*de minimis* PRPs at sites in which *de minimis* settlements were reached.

This Part sets forth the major findings of both surveys. These concern the methods used to initiate and encourage *de minimis* settlements, the settlement approaches used by EPA, the role of the major parties with respect to *de minimis* settlements, the timing of the *de minimis* settlements, the criteria used to determine *de minimis* status, the nature of reopeners and premiums, and the distribution of *de minimis* moneys.

A. Methods to Initiate and Encourage De Minimis Settlements

We asked about the methods that the Regions currently use to initiate *de minimis* settlements and to encourage the formation of *de minimis* groups that will present settlement offers to EPA. The unanimous response was that EPA generally does not take the lead, and prefers to wait for the PRPs to organize themselves into groups and to approach EPA if they are interested in exploring the possibility of a *de minimis* settlement. None of the Regions had a standard policy for initiating or encouraging *de minimis* settlements.

Some Regions, however, do take some initiative, though mostly on an *ad hoc* basis. Not surprisingly, Regions I and V, which have entered into the largest number of *de minimis* settlements, also appear to make the most efforts in this regard.

Region I stated that it generally has a "kickoff" meeting after the RI/FS is completed and a week or two before sending the special notice for RD/RA, which triggers a period for negotiation.[185] At the "kickoff" meeting, Region I will indicate that it envisions a *de minimis* proposal at the site and that it will accept *de minimis* proposals from the PRPs. In addition, Region I usually sends out a *de minimis* offer at the same time that it enters into RD/RA negotiations in order to achieve a global settlement. Despite these efforts, its preference is to let the major and *de minimis* PRPs work out a settlement among themselves, thus saving EPA's resources.

In one recent case, Region III--after deciding to pursue a *de minimis* settlement--mailed a packet to all PRPs containing EPA's guidance concerning *de minimis* settlements. The mailing requested that PRPs seeking *de mininis* status explain why they qualified. Region III then made a determination as to which parties met the requirements for *de minimis* treatment and issued a unilateral order to the major PRPs at the site to perform the necessary remedy. Negotiations with the *de minimis* PRPs followed.

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[185] *See* 42 U.S.C. _9622(e).

Region V sometimes initiates *de minimis* discussions after it obtains the waste-in information. In such cases, it informs the relevant PRPs that they are candidates for *de minimis* settlements, and often makes formal settlement proposals. For the majority of *de minimis* settlements that are not part of global settlements, Region V has started the discussions. The Region will circulate a draft *de minimis* proposal in cases in which there is no organized group of *de minimis* PRPs, but a large number of such parties.

Region IX stated that, in cases for which it believes a *de minimis* settlement is appropriate, it will suggest in its general notice letters that PRPs consider organizing a *de minimis* group. In one case involving thousands of PRPs, it is planning to include a return postcard in the first general notice that it will send all PRPs. The card has two boxes asking (1) whether the PRPs are interested in organizing a *de minimis* committee and (2) if the PRP is not interested in organizing a committee, whether the PRP is interested in participating in a *de minimis* committee. The postcard requests a response within 30 days.

Region X indicated that, during the last year, it has sought to determine when *de minimis* settlements might be appropriate. In such cases, it notifies the PRPs and asks them to provide information in support of their claim for *de minimis* status, and to indicate whether they are interested in a *de minimis* settlement.

The view of the PRPs that we interviewed was that *de minimis* discussions are generally initiated by the PRPs, and not by EPA. Several attorneys indicated that, despite pressure from EPA Headquarters, the Regions are not particularly interested in pursuing *de minimis* settlements. Several also urged EPA to become more involved in the *de minimis* settlement process; one of them advocated the use of a system of incentives and disincentives to induce the Regions to comply with the guidelines of EPA Headquarters.

One attorney complained that the settlement process would be greatly aided if EPA circulated the waste-in information earlier in the process. It was stated that the *de minimis* parties are often ready to cash-out early, but can proceed only at EPA's slow pace. It was also noted that it would be prohibitively expensive for the *de minimis* parties to prepare the waste-in information themselves.

Another attorney noted that the process of formation of *de minimis* committees was itself haphazard, as it requires a party with a great deal of commitment and a willingness to expend significant resources. He has found that, among small parties, there is often none that wishes to take a leadership role. He suggested that EPA fill the vacuum.

B. Settlement Approaches

We asked whether the Regions employ a standard settlement form different from the EPA model form, and whether they employ any distinctive approaches. There were several important findings in response to this set of questions.

First, the Regions expressed a strong and almost unanimous preference for global settlements--*de minimis* settlements entered concurrently with settlements pursuant to which the major parties undertake to perform the cleanup; the PRPs confirmed that EPA preferred this approach. Global settlements are generally not reached until the RD/RA phase, and, by definition, do not involve resolving the responsibility of the *de minimis* parties before the Agency is in a position to negotiate with the major parties.

On this question, Region I indicated that if its negotiations with the major parties do not succeed, it will issue a *de minimis* administrative order on consent on a take-it-or-leave-it basis. It will not engage in negotiations.

Region V encourages the *de minimis* parties to deal directly with the major parties. In fact, it takes the position that a separate offer for a *de minimis* settlement following a special notice letter is not a good faith offer for the purposes of section 122(e); at this stage, the *de minimis* proposal should come as part of an agreement (by the major parties) to perform the remedy. It will deal directly with the *de minimis* PRPs only if the major parties are being uncooperative.

Second, while the Regions generally indicated that they use the model agreement, they make adjustments on a site-specific basis, and engage in negotiations over at least some of the terms. Not surprisingly, several Regions indicated that *de minimis* settlements place a high burden on EPA's managerial resources. Only Regions I and V (those with the highest number of settlements) stated that at present they proceed on a take-it-or-leave-it basis.

In particular, Region V stated that when it circulates a draft of a settlement, it asks for written comments (by the *de minimis* and major parties), and indicates that it may respond unilaterally to any of the comments that it receives. It also states, however, that the cost terms are not negotiable. After reviewing the comments, it sends out a final settlement offer on a take-it-or-leave-it basis.

C. Role of the Major Parties

We inquired about whether non*de minimis* parties typically object to the entry of *de minimis* settlements, the types of objections that they raise, and whether such complaints pose a significant threat to the *de minimis* settlement program. There was virtual consensus that the major parties often create significant roadblocks to *de minimis* settlements. The areas of conflict include the criteria used to define *de minimis* parties, the reliability of the waste-in lists, the amount of the premium, and, in particular, the uses of the proceeds of the *de minimis* settlement.

It is clear from the responses that the major parties see themselves involved in a zero-sum game with the *de minimis* parties: the greater the *de minimis* settlement, the less that the major parties will have to pay. Moreover, Region I noted that, except in the case of global settlements, major parties do not favor *de minimis* settlements because they believe that they can do better by pursuing actions for contribution. Their opposition can lead to a substantial delay of the *de minimis* settlement and a substantial drain of EPA resources. While it does not appear that they have been successful at blocking *de minimis* settlements once negotiations were underway, they seem to have diminished the appetite of several of the Regions for pursuing such settlements.

The most important specific issue to be raised by the responses is that the major parties have a strong preference for global settlements that include a *de minimis* component, rather than *de minimis* settlements that occur earlier. Region V indicated that in the former case the proceeds of the *de minimis* settlement are given to the major PRPs as seed money for the site remedy, whereas under the latter case, they are placed in the Superfund.

It would seem that the effect of turning the proceeds from *de minimis* parties to the major PRPs in a global settlement would be to leave unpaid a greater part of EPA's past costs. The major PRPs that undertake the cleanup might believe, however, that EPA will seek these costs from nonsettling parties, if there are any, or that it might be more willing to compromise them in exchange for a cleanup of the site. Background conversations with EPA officials revealed that such compromises do, in fact, take place.

The PRPs noted substantial tension between *de minimis* and major parties. One attorney stated that this tension is fueled in part by the lack of sufficiently specific guidance on *de minimis* settlements. He stated that, if such guidance existed, the major PRPs would not demand that the *de minimis* parties pay exorbitant premiums.

Several attorneys indicated that the major parties generally have the capacity to derail *de minimis* settlements. They added that, as a result, the Regions are reluctant to become involved with *de minimis* settlements because of the risk that they will derail a settlement with the major parties.

D. Timing of the De Minimis Settlements

We asked a series of questions concerning the stage of the cleanup process during which the Regions pursue *de minimis* settlement. There was disagreement about the desirability of pre-ROD settlements. There were also reports that EPA Headquarters has begun to pressure the Regions into concluding *de minimis* settlements at earlier stages of the cleanup process.

Region II indicated that the lack of concrete estimates for the remedial costs should not preclude the entry of a *de minimis* settlement, because the matter can be addressed through the use of an appropriately high premium.

Region V stated that in the past it had not done *de minimis* settlements until the RI/FS was almost complete, but that it is currently attempting to proceed earlier (even before the RI/FS is started), in response to pressure from EPA Headquarters. In the case of global settlements, however, it cannot proceed until the ROD is complete, since global settlements are part of an RD/RA consent decree and the special notice for negotiations concerning the RD/RA is not issued until after the ROD stage.

Despite its willingness to consider early settlements, Region V said that complaints about waste-in lists are frequent, and that by the time they are resolved the RI/FS is well-along. At that point, there is a "mind set" that since global settlement negotiations may take place only one year later, it might not make sense to pursue a separate *de minimis* settlement. It appears clear that the Region will not take the initiative in this regard if the ROD will soon be issued.

In contrast to the view that early *de minimis* settlements are possible, Region I stated that most of the information about waste-in contributions and cost estimates for the site remediation are available only at or around the time that RD/RA negotiations commence, and that earlier settlements are therefore undesirable. As a result, it favors global settlements.

Regions III, VII, and X stated that until the ROD is completed, the list of PRPs is not sufficiently accurate and the estimates of cleanup costs are too unreliable to permit it to prepare a *de minimis* settlement.

Region X added, however, that recently it has begun to attempt earlier settlements in response to pressure from EPA Headquarters for the entry of *de minimis* settlements before the completion of even the RI/FS. Region IX also reported the interest of EPA Headquarters in earlier settlements but noted that the Regions do not know what the remedial costs will be. It indicated that for early settlements to be possible, reliable methods for estimating costs would have to be developed.

E. De Minimis Status

We asked the Regions whether they apply any specific criteria to determine a PRP's eligibility for *de minimis* status. The responses revealed that these determinations are made on an *ad hoc* basis. Although the Regions purport to be guided by the EPA documents, these, as we have indicated above,[186] do not make more concrete the statutory requirement that the amount of hazardous substances contributed be "minimal."

Region I stated that it has used cutoffs of 0.5%, 1% , and 2%, and that in general it will not use cutoffs larger than 2%. Region III responded that in one case it used a 2% cutoff, but based it on the contributions of only the identified PRPs. Region V reported that it looks for a "clean break" in the waste-in list, to avoid the argument that its cutoff is arbitrary. It also indicated that *de minimis* parties tend to comprise 15% to 30% of the total volume at the site. Region VIII reported that in one case, one of the criteria for *de minimis* status was the accuracy of the information submitted in response to EPA's requests. Region X stated that a party that contributed around 1% will generally be considered *de minimis*. It added, however, that it might accord *de minimis* status to a party that contributed 4%, if, for example, the remaining parties contributed around 20%.

One private attorney stated that in some cases EPA appears to have a predetermined cutoff in mind when it considers a *de minimis* settlement proposal. He added that EPA is reluctant to reveal when it is applying predetermined criteria, or what terms might be negotiable.

F. Reopeners and Premiums

We inquired generally about the Regions' use of reopeners in *de minimis* settlements. Every Region appears to use the additional information reopener, but many favor releasing the cost overrun and further response action reopeners in exchange for a premium.

For example, Region I stated that the purpose of *de minimis* settlements is to extinguish the liability of *de minimis* parties. It views the cost overrun reopener as inconsistent with this objective. Region V stated that it tends to give PRPs a menu of choices--that is, they can pay a higher premium and not be subject to certain reopeners.

With respect to the premium charged in exchange for the cost overrun and further response action reopeners, we asked whether the Regions had used any standardized guidelines. There appears to be no established procedure for setting these premiums and the Regions indicated that the premiums are determined in a site-specific manner.

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[186] *See supra* Section III.A.1.b.

G. Distribution of De Minimis Moneys

We inquired about how the Regions apportion the proceeds of *de minimis* settlements. The answers revealed no uniform approach to the question.

Region I indicated that one advantage of a global settlement is that the *de minimis* money goes to the major PRPs at the site. In the case of earlier *de minimis* settlements, the money goes to the Superfund. Region IX stated that the use of the proceeds of *de minimis* settlements is a subject for negotiation with major PRPs. Region X indicated that it will put all the recovered *de minimis* money into the Superfund to reimburse EPA for past costs; it did contemplate the possibility that the settlement might be for more than the past costs.

For the most part, Region V tends to apply the vast majority of the moneys it recovers from *de minimis* PRPs to EPA's past costs and places them in the Superfund. This trend may be changing because of direction from EPA Headquarters that a larger portion of *de minimis* settlements be applied to future response costs. Particularly when there are identifiable nonsettlers who have been sitting on the sidelines, Region V is willing to carve out some of its past costs and apply the recovered amounts to fund future remedial costs because in Region V's view, it would not be fair to recover all of its past costs, thereby benefiting the nonsettlers (they might, however face contribution actions from the settlers). But in most cases Region V will recover all past costs first and place any excess money in an escrow account managed by the PRPs to fund future oversight and future work.

Background discussions with EPA officials revealed that there exists confusion as to whether the Agency can hold the proceeds of a *de minimis* settlement in escrow with the intention of, at a later time, turning it over to the PRPs performing the cleanup. It is clear that EPA can set up a site-specific special accounts to finance its own cleanup activities, and that it can turn over the money to the major parties as part of a global settlement. The problem arises when substantial time elapses between the *de minimis* settlement and a settlement with the major parties pursuant to which they undertake the cleanup at the site. This factor may also push in the direction of global settlements, rather than early *de minimis* settlements.

The private attorneys expressed serious concerns about the allocation of *de minimis* moneys. Several attorneys complained about the lack of more guidance from EPA Headquarters on the question. There seemed to be consensus that the major parties would oppose a *de minimis* settlement unless at least the future cost component of the proceeds was used for the site cleanup rather than being put back in the Superfund. One attorney indicated that, in several cases, EPA had taken the latter approach. Another commented that the issue of the distribution of the proceeds has the greatest potential for undermining *de minimis* settlements.

One attorney stated that some Regions attempt to recover all of their past costs out of the *de minimis* settlement, whereas others are willing to use a certain proportion for future costs and recover the remainder of their past costs from recalcitrant PRPs. He added that the approach used also seems to depend on the identity of the EPA attorney handling the case, and that the issue of apportionment is subject to negotiation.

VI. Concluding Remarks

A. Recommendations for Improving the De Minimis Settlement Program

In light of the five principles set forth in Part II, we can make several recommendations for improvements in the *de minimis* settlement program. Because some of the proposals concern the allocation of authority between EPA Headquarters and the Regions, we do not refer to EPA as a single entity. Where relevant, we indicate whether our recommendations are congruent with the recent guidance document on waste contributors.

1. The Regions should actively seek de minimis settlements, by informing PRPs of their potential eligibility as soon as a waste-in list has been assembled, and by circulating a draft settlement agreement.

Part V reveals that the predominant approach has been for Regions to wait for *de minimis* groups to form and take the first step in proposing *de minimis* settlements. But the formation of such groups requires the expenditure of transaction costs by private parties and can take considerable time. Moreover, the groups might not properly represent the smaller *de minimis* parties who have the greatest interest in settlement.

We believe that the approach generally followed until now violates Principle I: it is not sufficiently attentive to the transaction costs that the Superfund program imposes on *de minimis* PRPs. Instead, in sites that look like likely vehicles for *de minimis* settlements, the Regions should take the lead. The recent guidance document on waste contributors constitutes a step in the right direction by granting the Regions discretion to circulate draft settlements to parties identified as *de minimis* but does not go far enough: the Regions should be required to do this in every case involving PRPs that, at the time of the release of the waste-in list, appear to qualify for *de minimis* status.

2. The Regions should not wait until the later stages of the cleanup process before entering de minimis settlements, and should not rely on global settlements as the mechanism for resolving the liability of de minimis parties.

Part IV shows that the vast majority of *de minimis* settlements were entered after the ROD. Part V reveals that the majority of the Regions have shown little interest in undertaking pre-ROD settlements. In addition, they have favored resolving the liability of de minimis parties as part of global settlements pursuant to which the major parties undertake cleanups. The favored strategy has been to require *de minimis* parties to negotiate directly with the major parties to determine their contribution to the cleanup cost.

These approaches violate Principles I and III. With respect to Principle I, it ought to be clear that the major parties will not include, as one of their objectives, the minimization of the transaction costs borne by *de minimis* parties. Thus, EPA abdicates its responsibility to promote this goal by requiring that the *de minimis* PRPs deal directly with the major parties.

Principle III--that fairness should be determined *ex ante*--is undermined by excessive concern with the accuracy of the estimates of cleanup costs. Instead, the emphasis should be on designing procedures to estimate these costs at early stages (see Recommendation 7).

3. The Regions should not engage in time-consuming negotiations over *de minimis* settlements.

Part IV shows great variation in the contents of provisions in *de minimis* settlements that ought to be relatively standard. As to reopeners, for example, the lack of homogeneity is staggering. There also are significant differences in the definition of *de minimis* status and use of *de minimis* moneys. Given the existence of model documents, this wide variation suggests that negotiation over settlement terms is common. Part V confirms that, indeed, several of the Regions engage in such negotiation.

This practice violates Principle V: *de minimis* settlements are not the place for individualized dispute resolution. In particular, we believe that negotiation over terms increases the conflict between *de minimis* parties and major parties, and, if early *de minimis* settlements are entered, between EPA and the major parties.

The recent guidance document on waste contributors and the practice of Region V are generally consistent with this recommendation.

4. EPA Headquarters should provide guidelines for the determination of appropriate payments and terms in *de minimis* landowner settlements.

Current guidelines on *de minimis* landowner settlements contemplate some payment but they do not specify either how to compute this payment or its relationship to the estimated costs of cleanup. Principles of equal treatment argue for guidelines promulgated by EPA Headquarters.

5. EPA Headquarters should create and maintain a central repository of *de minimis* settlement documents, readily accessible to the public.

Assurance that similarly situated parties are treated similarly requires knowledge of what actual practice has been. Moreover, efforts to standardize the practice would benefit from knowledge of the variants already employed. Currently, documents, if available at all, are dispersed throughout the regions and hence difficult, if not impossible, to consult.

6. EPA Headquarters should make further efforts to standardize the general terms of de minimis settlements.

Part of the heterogeneity in the approaches of the Regions, and the significant differences even across sites in the same Region is due to the lack of concrete guidance on several important issues. Most striking is the variation in the volumetric determinant used to determine *de minimis* status. Part IV reveals a range of 0.1% to 10%. It is theoretically possible that these differences are appropriate given site-specific differences, but the Regions' responses in Part V provide little support for such speculation: none set forth an approach for determining an appropriate cutoff. Similarly, Part IV reveals great variation in the additional information reopener--variation that seems difficult to explain on the basis of site-specific differences.

This lack of uniformity violates Principle V. It increases the incentives for parties to protest the terms of individual settlements, and increases the probability that such settlements could be successfully challenged in court. Unfortunately, the recent guidance document on waste contributors does nothing to address these concerns.

7. EPA Headquarters should establish, as a high priority, a mechanism for estimating the cleanup costs at a site, as it is undesirable for this task to be performed at the regional level.

The most prevalent response given by the Regions in Part V is that pre-ROD *de minimis* settlements are impractical because of the lack of sufficiently reliable information on cleanup costs. The recent guidance document has attempted to deal with this question by, as a first step, asking the Regions to identify similar sites, and review RODs, as well as more current information. It also suggests that the Regions could determine the unit costs for different remedial technologies. As a second step, EPA Headquarters has undertaken to obtain information to ease the Regions' burdens.

The allocation of responsibility contained in this guidance document is misplaced. The burden involved in the tasks that the Regions are being asked to perform is staggering. At the outset, one should note that it does not make sense for a Region to confine itself to its own sites in determining the costs of similar cleanups, as the inventory of comparable sites that have progressed sufficiently in the cleanup process may be small or nonexistent. Moreover, the guidance document does not appear to contemplate such limitation. It is not clear what a Region would know about sites in other Regions. In addition, there is no central repository for RODs, and no EPA database contains their full terms. While they can generally be obtained from the individual Regions, this process is cumbersome and time-consuming.

As a result of these difficulties, we are extremely skeptical that the Regions will make cost estimates in the manner contemplated by the guidance document. The responsibility should be placed squarely on EPA Headquarters. We are cognizant of the difficulties involved, but they are magnified many times if the task must be performed by the Regions, even as a temporary matter.

8. EPA Headquarters should attempt to establish presumptively applicable premiums for different stages in the cleanup process, and should direct that the premium benefit the parties that take responsibility for the cleanup.

Not surprisingly, an element over which there is substantial conflict among EPA, and the *de minimis* and major parties is the premium charged in exchange for a waiver of the cost overrun and further response action reopeners. Part IV reveals a wide variation: it identifies a range of 53.33% to 250%. This difference is not explained, on its face by the different stage at which the settlements were entered. Moreover, the interviews with the Regions discussed in Part V do not reveal a standardized method for calculating them. Neither is such an approach set forth in any of the guidance documents. As indicated in Recommendation 6, the potential for conflict will be diminished substantially if a standardized approach is devised.

If EPA Headquarters undertakes the task of establishing estimates for cleanup costs (see Recommendation 7), it should also attempt to determine appropriate premiums by comparing, for each stage in the cleanup process, the actual cleanup costs with its estimates.

Moreover, Parts IV and V revealed large discrepancies in the uses of the premium, and, in particular, the extent to which they could benefit the major parties if they agree to perform the cleanup. Consistent with Recommendation 9, EPA Headquarters should clarify that the parties bearing the risk of higher costs as a result of their agreement to undertake a cleanup, should also benefit if the cost estimates in the *de minimis* settlement (including the premium) are higher than the actual cost of the cleanup.

9. EPA Headquarters should clarify the mechanisms by which a Region can set up a site-specific special account with the proceeds of de minimis settlements and hold the moneys until it is ready to settle with the major parties.

The discussion of the guidance documents in Part III, as well as our own background discussion with EPA officials reported confusion as to whether EPA can set up an account to finance a cleanup in cases in which it will not perform the cleanup itself and negotiations with the major parties are not sufficiently advanced. In these cases, the funds are generally placed in the Superfund and, in violation of Principle IV, are not made available to finance a later cleanup by the major parties. These parties, understandably, object to this outcome, and the resulting friction is one of the reasons why several of the Regions favor global settlements--a practice inconsistent with Recommendation 2.

EPA Headquarters should clarify that such accounts are permissible and should urge the Regions to employ them in appropriate cases.[187]

B. Suggestions for Further Research

This study reveals several areas for further research. First, it underscores the problem of requiring a government agency to take into account the transaction costs that it imposes on private parties. Second, it provides an important example of the problems of coordination in a large federal agency; it is clear that EPA Headquarters, perhaps because of pressure from Congress, appears more interested than the Regions in settling early with *de minimis* parties. Third, it identifies important theoretical issues involving the study of settlements with multiple defendants; here, the *de minimis* and major parties have different sets of interests, due in part to the different ratio of transaction costs to cleanup costs that they face, and are subject to a different legal regime. Fourth, it points to the need for further empirical research on the structure of transaction costs faced by defendants.

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[187] EPA recently adopted procedures for the use of funds in Superfund cash-out settlements. *See* Memorandum of Bruce Diamond on Interim Cashout Settlement Procedures (January 7, 1992). These procedures, however, do not clear up the confusion discussed here.